UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00CV0214B(J)
	)	
JOHN W. MARTIN,	)	
	)	
Defendant.	)	

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 28th day of July, 2000.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of July, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: John W. Martin, 814 N. 11th Ave., Collinsville, OK 74021.

Libbi L. Felty
Paralegal Specialist

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00CV0230C(E)
	)	
BILLIE M. MOORE,	)	
	)	
Defendant.	)	

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 28th day of July, 2000.

UNITED STATES OF AMERICA

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(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of July, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Billie M. Moore, 1908 E. 36th St. N., Tulsa, OK 74110-1124.

Libbi L. Felty
Paralegal Specialist

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ZINKE AND TRUMBO, INC.,

Plaintiff,

vs.

ENERGY DRILLING COMPANY,

Defendant.

Case No. 00-CV-302-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 27th day of July, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

23

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD CARRIGER,

Plaintiff,

vs.

OKLAHOMA TURNPIKE AUTHORITY,

Defendant.

Case No. 99-CV-1112-BU

ORDER

This matter comes before the Court upon Defendant's Motion to Dismiss. Upon review of the record, it appears that Plaintiff has not responded to the motion within the time prescribed by N.D. LR 7.1(C) and has not requested an extension of time to so respond. Pursuant to N.D. LR 7.1(C), the Court, in its discretion, deems the motion confessed.

Upon independent review of the motion, the Court finds that dismissal of Plaintiff's action under Rule 12(b)(6), Fed. R. Civ. P., is appropriate. Defendant is sovereignly immune, based on the Eleventh Amendment, from suit by Plaintiff under the Age Discrimination in Employment Act, 29 U.S.C. § 623, et seq. Moreover, Plaintiff does not have a cause of action against Defendant for age discrimination under the Oklahoma Anti-Discrimination Act, OKLA. STAT. tit. 25, § 1101, et seq.

Accordingly, Defendant's Motion to Dismiss (Docket Entry #18) is **GRANTED**.

ENTERED this 27th day of July, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

22

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

BETH CUMMINS,

Plaintiff,

vs.

PENNWELL CORPORATION,

Defendant.

Case No. 99-CV-594-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 27th day of July, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

49

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD CARRIGER,

Plaintiff,

vs.

OKLAHOMA TURNPIKE AUTHORITY,

Defendant.

Case No. 99-CV-1112-BU

ORDER

This matter comes before the Court upon Defendant's Motion to Dismiss. Upon review of the record, it appears that Plaintiff has not responded to the motion within the time prescribed by N.D. LR 7.1(C) and has not requested an extension of time to so respond. Pursuant to N.D. LR 7.1(C), the Court, in its discretion, deems the motion confessed.

Upon independent review of the motion, the Court finds that dismissal of Plaintiff's action under Rule 12(b)(6), Fed. R. Civ. P., is appropriate. Defendant is sovereignly immune, based on the Eleventh Amendment, from suit by Plaintiff under the Age Discrimination in Employment Act, 29 U.S.C. § 623, et seq. Moreover, Plaintiff does not have a cause of action against Defendant for age discrimination under the Oklahoma Anti-Discrimination Act, OKLA. STAT. tit. 25, § 1101, et seq.

Accordingly, Defendant's Motion to Dismiss (Docket Entry #18) is **GRANTED**.

ENTERED this 27th day of July, 2000.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ANDERSON-MARTIN MACHINE COMPANY, PLAINTIFF,	)	
vs.	)	CASE NO. 99-CV-386-K (M)
FCI, INC., DEFENDANT.	)	

REPORT & RECOMMENDATION

Defendant's Motion to Dismiss Under Rule 12(b) [Dkt. 24-2] and Defendant's Motion to Strike the Affidavit of John Bylander [Dkt. 29-1] are before the undersigned United States Magistrate Judge for report and recommendation.

Background

Plaintiff, an Arkansas corporation, brings this action alleging patent infringement against Defendant, an Ohio corporation. Plaintiff has asserted specific personal jurisdiction exists in Oklahoma based on Defendant's alleged sale of an allegedly infringing product in Oklahoma. Plaintiff asserts general personal jurisdiction based on Defendant's alleged substantial and continuous activity in Oklahoma.[1]

Defendant previously moved to dismiss Plaintiff's complaint for lack of personal jurisdiction. [Dkt. 4]. That motion was referred to the undersigned and a hearing on the motion was scheduled for April 17, 2000. Prior to the hearing, Plaintiff advised that it desired to present the testimony of Mr. Bylander at the hearing. [Dkt. 17]. On April 12, 2000, a telephone conference was held on Defendant's objection to the

[1] Plaintiff discusses at some length the application of the venue statute to this case because Oklahoma has three federal districts. The undersigned has analyzed the jurisdictional issue by considering whether there is personal jurisdiction over Defendant in any district in Oklahoma.

proposed presentation of testimony. Plaintiff's counsel was informed of the court's view that live testimony would be unfair unless the witness were deposed. Plaintiff was given the option of scheduling Mr. Bylander for deposition prior to a rescheduled hearing on Defendant's motion to dismiss. Plaintiff's attorney declined the deposition and elected to proceed without presenting Mr. Bylander's testimony. The undersigned issued a recommendation that Defendant's motion to dismiss be granted [Dkt. 21]. Plaintiff filed an objection to the recommendation; submitted Mr. Bylander's affidavit in support of the objection; and filed an amended complaint. Defendant seeks to strike Mr. Bylander's affidavit, [Dkt. 29-1], and has moved to dismiss Plaintiff's amended complaint, [Dkt. 24-2].

Motion to Strike [Dkt. 29-1]

In light of the foregoing, the undersigned finds that basic fairness requires that Defendant's motion to strike be granted. Plaintiff should not be permitted to utilize the untested affidavit of Mr. Bylander after specifically declining the opportunity to depose him so his testimony could be properly presented to the court. Accordingly, the undersigned recommends that Mr. Bylander's affidavit be stricken.

Motion to Dismiss [Dkt. 24-2]

Even if Mr. Bylander's affidavit is considered, the undersigned finds that Plaintiff's amended complaint should be dismissed for lack of personal jurisdiction.

Plaintiff no longer contends that Defendant sold an allegedly infringing device in Oklahoma. Therefore to maintain this action here, Plaintiff must establish the existence of general jurisdiction in Oklahoma. General jurisdiction requires that Plaintiff

establish that Defendant has continuous and systematic contacts with the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). That the requisite continuous and systematic contacts are lacking was discussed in the April 28, 2000, Report and Recommendation. [Dkt. 21]. Mr. Bylander's affidavit does not change the conclusion.

In its attempt to establish Defendant's continuous and systematic contacts with Oklahoma, Plaintiff relies upon the affidavit of its general manager, Tom Henderson, and the affidavit of its former national sales manager, John Bylander. There are two problems with these affidavits: they are vague; and, more significantly, the substance of the affidavits does not establish continuous and systematic contacts with the state of Oklahoma.

The affidavits reference sales in Oklahoma without providing any detail of what was sold, when it was sold or to whom it was sold. They provide a listing of "past customers" in Oklahoma but do not supply any information as to when these customers did business with Defendant or what was purchased from Defendant. The most specific information is a reference to a single "installation" of equipment manufactured by Defendant in Oklahoma in 1996 or 1997 which was valued at well over $50,000.00.

Given that this case was filed in May 1999 and Defendant's motion to dismiss for lack of personal jurisdiction has been pending since September 1999, it is not unreasonable to expect that Plaintiff would have presented more concrete evidence of Defendant's alleged substantial and continuous activity within the state of Oklahoma.

Said differently, it would seem that if Plaintiff is serious about wanting to haul an Ohio corporation into court in Oklahoma, it should be a relatively simple matter for Plaintiff to present information obtained from Defendant's alleged customers regarding the specifics of Defendant's alleged contacts with Oklahoma. Moreover, a one-time installation of equipment occurring in 1996 or 1997 does not establish systematic and continuous contact sufficient to establish general personal jurisdiction.

While Plaintiff's burden of proof at this stage is a light one, *Taylor v. Phelan*, 912 F.2d 429 (10th Cir. 1990), it is Plaintiff's burden. Based upon Plaintiff's failure to carry its light burden of establishing a *prima facie* case of Defendant's substantial and continuous activity in Oklahoma, the undersigned United States Magistrate Judge RECOMMENDS that Defendant's Motion To Dismiss Under Rule 12(b) [Dkt. 24-2] be GRANTED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

SUBMITTED this 27th day of July, 2000.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy the foregoing pleading was served on each or the parties hereto by mailing the same to them or to their attorneys of record on the 28 Day of July 2000.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY J. WALKER,
SSN: 448-40-7496,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 99-CV-630-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 27th day of July, 2000.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 27 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY J. WALKER,
SSN: 448-40-7496,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 99-CV-630-M

ENTERED ON DOCKET

DATE JUL 28 2000

ORDER

Plaintiff, Gary J. Walker, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92

[1] Plaintiff's January 30, 1990 application for Disability Insurance benefits was denied initially on May 2, 1990 and was not further pursued by Plaintiff. His new application, filed December 17, 1993 was also denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held February 2, 1995 after which an ALJ entered a decision dated March 13, 1995, denying benefits. Plaintiff appealed to the United States District Court for the Northern District of Oklahoma which remanded the claim to the Commissioner on January 23, 1997 for supplemental hearing to obtain a vocational expert's testimony regarding the impact of Plaintiff's stress impairment on the occupational base. A supplemental hearing was conducted by a new ALJ on August 10, 1998. By decision dated November 19, 1998, the ALJ entered the findings that are the subject of this appeal. The Appeals Council denied review of the ALJ's decision on June 5, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born February 27, 1943, and was 55 years old at the time of the second hearing. [R. 70, 88, 444]. He claims to have been unable to work due to chest pain, shortness of breath and inability to cope with stress after suffering a heart attack in July 1988 and undergoing removal of a cancerous tumor in his right lung in 1990. [R. 450, 462]. He also claims high frequency hearing loss, drowsiness, peptic ulcer disease and low back arthritis as impairments. [R. 141, 149].

The ALJ determined that Plaintiff has severe impairments consisting of status post 5-vessel coronary artery bypass grafting, status post right thoracotomy and mild high frequency hearing loss. [R. 431]. The ALJ concluded that, despite these severe impairments, Plaintiff retains the residual functional capacity (RFC) to perform light work activity with restrictions on prolonged walking or standing; exposure to dust,

allergens, fumes, smoke, gases, chemicals, or temperature extremes; or bilateral high frequency hearing and for avoiding high stress jobs or jobs requiring more than routine tasks with regular supervision and no active interaction with the general public. Although he determined that Plaintiff could not return to his past relevant work (PRW) as assistant fire marshal, firefighter or security officer, he found that there are other jobs in the economy in significant numbers that Plaintiff could perform with his RFC. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 26]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail). For the reasons discussed below, the Court affirms the decision of the Commissioner.

Because Plaintiff did not pursue his first claim after its denial, the beginning date for consideration of Plaintiff's current claim is the day after his previous application was denied by the Social Security Administration, May 2, 1990. The ending date is December 31, 1993, the date Plaintiff was last insured for disability benefits. In order to qualify for benefits, Plaintiff must prove he was disabled during that time period.

Plaintiff asserts the ALJ erred in finding Plaintiff did not have an impairment that met or equaled Listing 4.02B.[2] Section 4.00 of the Listing of Impairments deals with

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[2] At Step 3 of the evaluative sequence, the ALJ is required to determine whether a claimant's impairment is equivalent to one of the impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (Listings). *Id.* § 416.925. *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996). The Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from performing any gainful activity. If a listing is met or equaled, the claimant is deemed disabled. *Id.* If no listing is met, the evaluation proceeds to the fourth step in the (continued...)

impairments of the cardiovascular system. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 4.02, reads as follows:

> *4.02 Chronic heart failure* while on a regimen of prescribed treatment (see 4.00A if there is no regimen of prescribed treatment). With one of the following:
>
> * * *
>
> B. Documented cardiac enlargement by appropriate imaging techniques (see 4.02A) or ventricular dysfunction manifested by S3, abnormal wall motion, or left ventricular ejection fraction of 30 percent or less by appropriate imaging techniques; and
>
> 1. Inability to perform on an exercise test at a workload equivalent to 5 METs or less due to symptoms of chronic heart failure, or, in rare instances, a need to stop exercise testing at less than this level of work because of:
>
> a. Three or more consecutive ventricular premature beats or three or more multiform beats; or
>
> b. Failure to increase systolic blood pressure by 10 mmHg, or decrease in systolic pressure below the usual resting level (see 4.00C2b); or
>
> c. Signs attributable to inadequate cerebral perfusion, such as ataxic gait or mental confusion; and
>
> 2. Resulting in marked limitation of physical activity, as demonstrated by fatigue, palpitation, dyspnea, or anginal discomfort on ordinary physical activity, even though the individual is comfortable at rest.

In order to support an automatic finding of disability under the regulations, Plaintiff must show that his impairment met all of the required medical criteria for the listing under which he claims disability. *Sullivan v. Zebley*, 493 U.S. 521, 530 (1990).

Plaintiff first claims the ALJ did not sufficiently discuss the requirements of the listings and did not provide a serious analysis of the listings in his decision. The Court

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[2] (...continued)
evaluative sequence.

disagrees. The Social Security Act requires the Commissioner to make findings of fact based on the evidence and to discuss the evidence, stating the reasons for any unfavorable decision. 42 U.S.C. § 405(b)(1). In *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996), the Tenth Circuit ruled the ALJ's summary conclusion that the claimant's impairment did not meet or equal a listing without identifying the relevant listing, discussing the specific medical evidence related thereto, or stating the rationale for his determination, did not provide enough analysis for a meaningful judicial review. In this case, the ALJ set forth a summary of Plaintiff's medical record, stated the listings he considered and made findings sufficient for judicial review. [R. 423]. The ALJ's decision, considered in its entirety, adequately addresses the listings considered by the ALJ and contains sufficient discussion of the evidence and its impact on the ALJ's determination that Plaintiff's impairments do not meet or equal the listings.

The medical portion of the record has been adequately recapped by the ALJ in his decision and the parties in their briefs. At issue is the testimony by a medical expert, S. Krishnamurthi, M.D., at the hearing conducted August 10, 1998, that Plaintiff's condition met the criteria for Listing 4.02B, which the ALJ rejected. [R. 481-482]. Dr. Krishnamurthi testified that Plaintiff currently met the listing based upon an ejection fraction of 37 percent. *Id.* [3] Plaintiff concedes Listing 4.02B requires an ejection fraction of 30 percent or less. However, Plaintiff asserts that it is not clear

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[3] An ejection fraction is "the ratio of left ventricular stroke volume (SV) to end-diastolic volume (EDV)." J. Hurst, The Heart Arteries and Veins 89 (5th ed. 1982). An ejection fraction averages 0.67 +- 0.08 in normal subjects. Heart Disease: A Textbook of Cardiovascular Medicine 474 (2d ed. 1984).

from Dr. Krishnamurthi's testimony what the doctor's basis was for believing the listing was met and that the basis "may have been an 'abnormal wall motion.'" [Plaintiff's Brief, p. 4]. Nevertheless, as pointed out by the Commissioner in his brief, even if this were true, Plaintiff's impairment would still not satisfy the essential criteria under subsections B1 and B2 of Listing 4.02.

Plaintiff's argument regarding the ALJ's reliance upon 1988 and 1991 METS testing for his determination that Plaintiff's impairment does not meet the criteria of Listing 4.04, is without merit. Again, Plaintiff protests the ALJ's rejection of Dr. Krishnamurthi's testimony but he points to no evidence in the record that supports his contention that he was disabled during the relevant time period under any of the listings he cites. Nor does he argue with the ALJ's assessment of the medical records and opinions from his treating physicians. He does not contend it was error for the ALJ to rely upon the opinions of Plaintiff's treating and examining physicians that, although Plaintiff could not return to his PRW, they thought him capable of doing some work during the relevant time period. [R. 231, 381, 384, 425]. Nor does he give any reason why the opinion of a consultative medical expert should be given more weight than the opinions of his own treating physicians. A treating physician's opinion generally is favored over that of a consulting physician. *Talbot v. Heckler*, 814 F.2d 1456, 1463 (10th Cir.1987).

To recover disability benefits, a claimant bears the burden of proving that he is disabled within the meaning of the Social Security Act. See 42 U.S.C. S 423(d)(5); *Hall v. Harris*, 658 F.2d 260, 264 (4th Cir.1981). Disability, as defined by the Act,

is the "inability to engage in any substantial gainful activity by reason of any **medically determinable** physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period not less than 12 months." 42 U.S.C. § 423(d)(1)(A)(emphasis added). A claimant meets this burden, and will be considered disabled, only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. S 423(d)(2)(A).

The ALJ is charged to interpret the facts and medical evidence and reach a conclusion regarding Plaintiff's RFC. *Castellano*, 26 F.3d at 1029. See also *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir.1987) (noting it is fact finder's responsibility to resolve genuine conflicts between opinion of treating physician and other contrary evidence). In this case, the ALJ had before him all the records and reports of treating and examining physicians in assessing Plaintiff's RFC during the relevant time period. The Court finds the ALJ did not err in rejecting the testimony of Dr. Krishnamurthi that Plaintiff's impairment met the criteria of Listing 4.02B as of the date of the hearing, which was fully five years after the expiration of Plaintiff's insured status and based upon a misunderstanding or incorrect reading of the listing. And, since the Commissioner properly determined that Plaintiff is not disabled, the criteria for

determining the onset of disability as prescribed in Social Security Ruling 83-20, a policy statement which describes the relevant evidence to be considered when establishing the onset date of disability, is completely irrelevant.

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Commissioner and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 27th day of July, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MERVENITA ROSS, Plaintiff, vs. SEARS ROEBUCK & COMPANY, a New York Corporation, DIAMOND EXTERIORS, INC., a Delaware Corporation and DIAMOND HOME SERVICE OF DELAWARE, INC., a Delaware Corporation, Defendants/ Third-Party Plaintiffs, vs. CHARLES FELLANTO and WARREN VAILES, d/b/a C & W CONSTRUCTION, Third-Party Defendants.	Case No. 99CV0378E (J)

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to FED. R. CIV. P. 41(9)(1), Plaintiff, Mervenita Ross, (hereinafter "Plaintiff"), and Defendants, Sears Roebuck & Company, Diamond Exteriors, Inc. and Diamond Home Service of Delaware, Inc., (hereinafter "Defendants"), by and through their undersigned attorneys, hereby stipulate that the above-styled and numbered action should be dismissed with prejudice to its refiling. Plaintiff and Defendants further stipulate that each party shall bear their or its own costs and attorneys' fees.

WHEREFORE, Plaintiff and Defendants pray that this Court enter an Order dismissing this matter with prejudice as to refiling.

DATED this 26th day of July, 2000.

JOHN H. TUCKER, OBA #9110
KERRY R. LEWIS, OBA #16519
LESLIE J. SOUTHERLAND, OBA #12491
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
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ATTORNEYS FOR PLAINTIFF

REUBEN DAVIS
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ATTORNEYS FOR DEFENDANTS SEARS ROEBUCK & COMPANY, DIAMOND EXTERIORS, INC. and DIAMOND HOME SERVICE OF DELAWARE, INC.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 00CV429C(J)
	)	
FRED W. CLAYTON,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 27 day of July, 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Fred W. Clayton, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Fred W. Clayton, filed his Waiver of Service of Summons herein on May 30, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Fred W. Clayton, for the principal amount of $14,902.44, plus accrued

interest of $4,733.85, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.375 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3880
(918)581-7463

PEP/dlo

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUL 27 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT L. McBEE, JR.,

Plaintiff(s),

vs.

STANDARD TESTING & ENGINEERING, CO.

Defendant(s).

Case No. 00-C-45-B

ENTERED ON DOCKET
DATE JUL 27 2000

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by 10-27-00 he Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 27th day of July, 2000.

THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUL 27 2000

NORMAN HOLT,)
)
Plaintiff,)
)
vs.) Case No CV-98-600-H(M)
)
PRUDENTIAL HEALTH CARE)
PLAN, INC.,)
)
Defendant.)

FILED
JUL 26 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSURE ORDER

Plaintiff having filed an unopposed application to continue the administrative closing of this action until September 24, 2000, it is hereby ordered that the Clerk continue the administrative termination of this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulations or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are order to notify the Court on or before September 24, 2000, as to whether this matter should be reopened or dismissed with prejudice, failure of which shall result in this case being deemed dismissed with prejudice.

IT IS SO ORDERED.

July 25TH, 2000.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SERCEL, S.A.,	)	ENTERED ON DOCKET
	)	DATE JUL 27 2000
Plaintiff,	)	
	)	
v.	)	Case No. 98-CV-800-H (E)
	)	
AVALON INTERNATIONAL, L.C.,	)	
	)	
Defendant.	)	

FILED

JUL 26 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF ADMINISTRATIVE CLOSURE

On joint motion of the parties and for good cause shown, this action is hereby placed in administrative closure until January 24, 2001. If Plaintiff has not filed a motion to reopen the case on or before that date, then as of that date all Plaintiff's claims herein shall be deemed dismissed with prejudice, with each party to bear his or its own attorneys' fees and costs.

DATED this 25TH day of July, 2000.

SVEN ERIK HOLMES
United States District Judge

217186

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KATHLEEN M. WHITE,
SSN: 440-56-8351,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 99-CV-431-K (M)

REPORT AND RECOMMENDATION

Plaintiff, Kathleen M. White, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

[1] Plaintiff's December 31, 1996 application for disability insurance benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held September 2, 1997. By decision dated September 19, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council denied review of the findings of the ALJ on April 15, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born February 25, 1947 and was 50 years old at the time of the hearing. [R. 41, 214]. She has a high school education and formerly worked as a clerical/receptionist, mortgage clerk, loan documentation clerk and tool room attendant. She claims to have been unable to work since March 1996, as a result of headache, pain and fatigue associated with Multiple Sclerosis. She claims she also suffers symptoms from Lupus and Rheumatoid Arthritis and is unable to cope with stress. [R. 55, 75, 84, 218-222]. The ALJ found that Plaintiff does not have a severe impairment, and therefore is not disabled. [R. 15-16]. The case was thus decided at step two of the five-step evaluative sequence for determining whether Plaintiff is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ should have proceeded beyond

step two to fully evaluate her alleged impairments and did not have good cause for rejecting the opinion of S. V. Vaidya, M.D., which establishes the existence of a severe impairment. The Court finds that the ALJ's analysis should have proceeded beyond step two and therefore the case must be remanded.

It is well-settled that Plaintiff has the burden to prove disability. *Hawkins v. Chater,* 113 F.3d 1162, 1164 (10th Cir. 1997). To demonstrate that an impairment is severe at step two, the plaintiff must show that it"significantly limits [her] physical or mental ability to do basic work activities." 20 C.F.R. § 416.920(c). The Tenth Circuit has characterized the step two showing as "de minimis." *Hawkins*, 113 F.3d at 1169. The mere presence of a condition or ailment documented in the record is not sufficient to prove that the claimant is significantly limited in the ability to do basic work activities. The claimant must establish by objective medical evidence that she has a medically determinable physical or mental impairment and that the impairment could reasonably be expected to produce the alleged symptoms. *See Hinkle v. Apfel.*, 132 F.3d 1349, 1352 (10th Cir. 1997). Once the relationship between a medically determinable impairment and the symptoms is established, the intensity, persistence, and limiting effects of the symptoms must be considered along with the objective medical and other evidence in determining whether the impairment is severe. SSR 96-3p. If the symptom related limitations have more than a minimal effect on the ability to do basic work activities, the ALJ must find that the impairment is "severe" and must proceed to the next step in the evaluative sequence, even if the objective medical evidence would not in itself establish that the impairment is severe. *Id.*

Plaintiff complains of limitations in her ability to work attributable to having, among other ailments, Multiple Sclerosis (MS).[2] The ALJ disbelieved Plaintiff and found that she has no impairments. [R. 16]. This determination is belied by the record. Dr. Vaidya was Plaintiff's treating physician as far back as 1986. [R. 103, 174]. Dr. Vaidya's treatment records and notes contain documented impressions, assessments, diagnoses and treatment for MS. [R. 114, 117, 118]. An April 24, 1991 MRI of the head confirmed "white matter" changes which "may be secondary to demyelinating disease." [R. 159]. On November 9, 1995, Dr. Vaidya reported results of a neurological evaluation and discussed Plaintiff's "protracted headaches." [R. 121-122]. He scheduled another MRI and an EEG. *Id.* The November 16, 1995 MRI confirmed "[m]ultiple foci of increased signal in the periventricular white matter bilaterally" unchanged since the prior (1991) study. [R. 119]. The ALJ stated that there was no basis for concluding Plaintiff had MS and that Dr. Vaidya had *never* diagnosed MS. [R. 15]. However, Dr. Vaidya's office treatment notes clearly demonstrate that he continued treating Plaintiff through November 1996 with the opinion that Plaintiff had MS. [R. 113-118]. On August 15, 1997, Dr. Vaidya wrote a letter to the ALJ stating that, based upon Plaintiff's symptoms and abnormal findings upon clinical examination, she was diagnosed to have multiple sclerosis. [R. 207].

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[2] Multiple Sclerosis: a disease in which there are foci of demyelination of various sizes throughout the white matter of the central nervous system, sometimes extending into the gray matter. Typically, the symptoms of lesions of the white matter are weakness, incoordination, paresthesias, speech disturbances, and visual complaints. The course of the disease is usually prolonged, so that the term *multiple* also refers to remissions and relapses that occur over a period of many years. The etiology is unknown. *Dorland's Medical Dictionary*, 28th Ed., p. 1496.

Based upon this record, the Court finds that the ALJ should have proceeded beyond step-two in the sequential evaluation. The undersigned United States Magistrate Judge, therefore, RECOMMENDS the decision of the Commissioner finding Plaintiff not disabled be REVERSED and the case REMANDED for further proceedings. In recommending remand of this case, the Court does not dictate the result, nor does it suggest that the record is insufficient. Rather, remand should be ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

SUBMITTED this 25th day of July, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 26 Day of July, 2000.

ML
7-19-00

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUL 26 2000

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 99CV1080H(M)
	)	
JAMES P. KEEVER,	)	
	)	
Defendant.	)	

FILED
JUL 25 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sums of $665.18 and $2,731.35, plus accrued interest of $716.46 and $3,579.59, plus administrative costs in the amount of $1.78 and $1.78, plus interest thereafter at the rates of 10.45% and 8% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the legal rate 6.375 until paid, plus costs of this action, until paid in full.

4. In addition to the regular monthly payment, the defendant hereby agrees to the submission of this debt to the Department of Treasury for inclusion in the Treasury Offset Program.

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Under this program, any federal payment the defendant would normally receive may be offset and applied to this debt.

5. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that James P. Keever will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 15th day of August, 2000, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of $60.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in his/her financial situation or ability to pay, and of any change in his/her employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

(e) The defendant shall provide the United States with current, accurate evidence of his/her assets, income and expenditures (including, but not limited to his/her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

6. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

7. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

8. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, James P. Keever, in the principal amount of $665.18, plus accrued interest in the amount of $716.46, plus interest at the rate of 10.45 until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate of 6.375 percent per annum until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney

JAMES P. KEEVER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOYAL TAYLOR, Plaintiff, v. AIK COMP and MERCER TRANSPORTATION CO., INC., Defendants.	)	ENTERED ON DOCKET DATE JUL 26 2000 Case No. 99-CV-62-K (M) F I L E D JUL 25 2000 Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

Before the Court is Plaintiff's motion for an order dismissing the above-captioned case without prejudice. *See* Fed. R. Civ. P. 41(a)(2). Defendants have failed to respond to Plaintiff's motion. Pursuant to N.D. LR 7.1(C), all matters asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed Plaintiff's motion for an order of dismissal and, through an independent inquiry, has determined that dismissal is appropriate at this time.

IT IS THEREFORE ORDERED that Plaintiff's Motion for "Order of Dismissal Without Prejudice" (# 12) is GRANTED and the above-captioned case is DISMISSED.

ORDERED this 25 day of July, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHELL OIL COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 98-CV-661-K**
	)	
BRUCE BABBITT, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

This matter came before the Court for consideration of Defendants' Motion for Summary Judgment. Having considered the issues and rendered a decision in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is entered for Defendants and against Plaintiff. The Order to Pay issued May 15, 1998, to the extent challenged here, is timely.

ORDERED THIS 25 DAY OF JULY, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHELL OIL COMPANY,)
)
Plaintiff,)
)
vs.) No. 98-CV-661-K
)
BRUCE BABBITT, SECRETARY,)
DEPARTMENT OF THE INTERIOR,)
et al,)
Defendants.)

O R D E R

Before the Court are the cross-motions of the parties for summary judgment. Plaintiff brings this action seeking a declaratory judgment that an "Order to Pay" issued to plaintiff by the Minerals Management Service (MMS) on May 15, 1998 is invalid or otherwise barred in part, and seeking injunctive relief against enforcement of that order. The Order to Pay requires plaintiff to pay additional royalties, and to recalculate and pay other royalties, on crude oil produced from onshore and offshore federal leases in California during the period March 1, 1988 through July 31, 1996. Plaintiff challenges only the portion of the Order to Pay which applies to the time period March 1, 1988 through May 15, 1992. Complaint at ¶15.

Plaintiff Shell Oil Company ("Shell") is a purchaser of crude oil from federal oil and gas leases onshore and offshore California on leases issued under the Mineral Leasing Act, 30 U.S.C. §§ 181-287 and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-

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1356. Shell's wholly owned subsidiary, Shell Western E & P Inc.,and other operating affiliates of Shell (collectively referred to as SWEPI) were the assignees of Shell's California federal leases. Shell purchases and has purchased from SWEPI crude oil produced from those assigned federal leases.

The Secretary of the Interior administers these leases and has authority to determine royalty value under these acts and the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. §§ 1701-1757. The MMS is the agency of the Department of the Interior (DOI) responsible for determining royalty value and collecting royalties due on federal and Indian oil and gas leases.

By letter dated July 18, 1996, MMS commenced an audit of Shell "and its operating affiliates" regarding valuation of California crude oil for royalty purposes. The letter requested that Shell provide certain documents. Shell responded by letter of August 15, 1996, stating that the documents would not be provided pending an ongoing legal challenge to MMS's right to obtain the type of documents requested[1].

Plaintiff argues that the Order to Pay issued it is barred by operation of the six-year statute of limitations in 28 U.S.C. §2415(a). Section 2415 states in pertinent part as follows:

> Subject to the provisions of section 2416 of this title. . . every action for money damages brought by the United States . . . or [an] agency thereof which is founded upon any contract . . . shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have

[1]Shell ultimately lost its legal challenge. See Shell Oil Co. v. Babbitt, 125 F.3d 172 (3rd Cir.1997).

been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

The government denies that this provision is applicable to MMS royalty orders. This Court has already rejected the government's position in Shell Oil Co. v. Babbitt, No. 96-C-1078-K (N.D.Okla.Oct.5, 1998). That decision is presently before the United States Court of Appeals for the Tenth Circuit. This Court therefore sees no reason to reiterate its analysis, which found that the result was dictated by Tenth Circuit precedent.

A cause of action to recover unpaid royalties accrues under 28 U.S.C. §2415(a) "on the date the contract was breached, which was the date the royalties were due and payable." Phillips Petroleum Co. v. Lujan, 4 F.3d 858, 861 (10th Cir.1993). The government stipulates that the accrual date here is April 30, 1988. (Defendants' Opening Brief at 35). As previously stated, the audit was initiated July 18, 1996, which ultimately resulted in the Order to Pay of May 15, 1998. Thus, the Order of Pay issued over ten years after the accrual date. However, the government makes an alternative argument in the event the six-year limitation period is found applicable. It contends that because Shell withheld the requested documents, which were purportedly necessary to the completion of the audit, the statute of limitation should be tolled, making the Order to Pay timely.

Excluded from the six-year limitation period is the time during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the

circumstances." 28 U.S.C. §2416(c). Thus, the limitation period "is tolled until such time as the government could reasonably have known about a fact material to its right of action." Phillips, 4 F.3d 858, 862 (10th Cir.1993). As pertinent to the case at bar, the statute of limitation is tolled pending completion of an audit only if facts material to the right of action were not known and reasonably could not have been known without the audit, and if the audit was completed within a reasonable time after the deficient royalty payment. Mobil Exploration & Producing U.S., Inc. v. Department of the Interior, 180 F.3d 1192, 1202 (10th Cir.1999). The "`reasonableness' requirement expressly set forth under §2416(c) is a complex factual determination to be made by the district court." Phillips, 4 F.3d at 863.

Summary judgment is appropriate if, after reviewing all the evidence submitted in the light most favorable to the non-movant, no genuine issue of material fact survives to merit a trial. Chambers v. Colorado Dep't of Corrections, 205 F.3d 1237, 1241 (10th Cir.2000)(citations omitted); Rule 56(c) F.R.Cv.P. When the parties file cross-motions for summary judgment, the Court is entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts. James Barlow Family Ltd. Partnership v. David M. Munson, Inc., 132 F.3d 1316, 1319 (10th Cir.1997), cert. denied, 523 U.S. 1048 (1998). Where different ultimate inferences may properly be drawn, the case is not one for a summary judgment. Seamons v. Snow, 206 F.3d 1021,

1026 (10th Cir.2000). In the case at bar, however, the parties have waived jury trial. (See Joint Case Management Plan received August 31, 1999). Therefore, differing ultimate inferences are also for the Court's resolution.

The Court begins with an overview of the regulatory framework which is in place. The overarching principle is that the government is entitled to royalties based on the "gross proceeds rule." See 30 C.F.R. §206.102(h). That is, no matter what valuation method is used, the value for royalty purposes cannot be less than the lessee's gross proceeds less applicable allowances. One valuation method is provided for arm's-length contracts, and it is the lessee's burden to demonstrate that a contract is arm's-length. 30 C.F.R. §206.102(b)(1)(i). For sales pursuant to a non-arm's-length contract, as in the case at bar[2], the valuation standards are set forth in a series of "benchmarks" contained in 30 C.F.R. §206.102(c). The first applicable benchmark is to be used in the calculation.

The first benchmark, described in §206.102(c)(1), states that reasonable value shall be determined by the "lessee's contemporaneous posted prices or the oil sales contract prices used in arm's-length transactions for purchases or sales of significant quantities of like-quality oil in the same field (or, if necessary

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[2]In explaining the distinction, one commentator has stated "[t]he MMS views sales between a lessee and its affiliate as inherently suspect and designed to minimize the price upon which royalties are valued." Colson, J., "Upstream, Midstream, Downstream - The Valuation of Royalties on Federal Oil and Gas Leases", 70 University of Colorado Law Review 563, 573 (1999).

to obtain a reasonable sample, from the same area). . . ." However, such posted prices or oil sales contract prices must be comparable to other contemporaneous posted prices or oil sales contract prices in the same field or area. Factors in determining comparability include price, market served, date of contract, terms, quality, and volume.

In the May 15, 1998 Order to Pay, the MMS advises Shell the audit revealed that because Shell has been using third party posted price (i.e., the second benchmark, described in §206.102(c)(2)), this has resulted in an underpayment of royalties of $968,227.27. The Order to Pay states that "Shell should have paid royalties based on the volume-weighted average price Shell received or paid for its arm's-length purchases and sales. Such a valuation method complies with the first benchmark, 30 CFR 206.102(c)(1)(1996)." (Defendant's Exhibit 1 at 3).

Shell contends that MMS knew the "very essence"[3] of this claim on September 26, 1989, when Shell told the audit supervisor for the State of California that Shell was valuing its oil production under benchmark two instead of benchmark one. (Plaintiff's Exhibit 36). As stated, this letter was sent to a state official, but the defendants herein have not denied adequate notice to the federal government. The defendants respond, it appears, that the use of

[3]See United States v. Gavilan Joint Community College Dist., 849 F.2d 1246, 1250 (9th Cir.1988)(quoting United States v. Kass, 740 F.2d 1493, 1497 (11th Cir.1984)). See also Philips, 4 F.3d at 862. (A material fact necessarily includes the fact that gave rise to the cause of action)(citing Kass). In this Court's reading, "material facts" may be a broader category than the "very essence" of the right of action.

benchmark two instead of benchmark one is not an automatic violation. As the government states, the MMS did not seek the requested documents "to learn on what basis SWEPI paid its royalties. It sought them to determine whether that basis complied with the regulations at 30 C.F.R. 206.102." (Defendants' Opposition Brief at 39). The Court agrees with defendants. Knowledge that a different benchmark is being used is not knowledge of the facts material to a right of action. Determining the propriety of royalty payments involves calculation, which requires examination of all pertinent documents.

Shell also asks this Court to find that the government did not actually "need" the documents over which the parties conducted their lengthy battle. (Shell's Opening Brief at 55). A major obstacle to such a finding is that the Third Circuit Court of Appeals has already ruled in that litigation "MMS is entitled to documents which will allow it to determine if Shell Ex is undervaluing oil for royalty purposes by first transferring it to Shell. Whether or not that is so, we are satisfied that for auditing purposes Shell must disclose the records the State requested." Shell Oil Co. v. Babbitt, 125 F.3d 172, 178 (3rd Cir.1997). The issue is foreclosed by res judicata.

Even if the issue were not foreclosed, the Court would not agree with Shell's arguments, which are of the "20/20 hindsight" variety. The fact that, in retrospect, MMS did not refer to particular documents in its Order to Pay is not dispositive. A civil litigant, for example, who resists a motion to compel and is

ordered to produce material can hardly proclaim the correctness of its position by the fact that movant did not ultimately "use" the documents at trial. The MMS cannot know if it "needs" a particular document until it sees the document, subject to objections such as Shell made before the Third Circuit.

The remainder of Shell's arguments are primarily a quite detailed elaboration of the assertion that MMS could have obtained the same information from other sources. Generally, these other sources include third parties, "publicly available information", even general allegations and rumors. The Court will not provide a counterpart of Shell's detailed discussion, because the Court rejects these arguments as a group. Adopting Shell's position would place courts in the position of micro-managing the MMS's conduct of an investigation. Defendants are surely correct that "the MMS must review company-specific and transaction-specific data, such as arm's length contracts." (Defendants' Opposition Brief at 40).

The Court is also unpersuaded by Shell's argument that the government could have shortened the litigation process over the documents, when it was Shell which was appealing. At one point, Shell even criticizes the government for asking the Interior Board of Land Appeals to reconsider its decision, "thus prolonging the administrative process." (Plaintiff's Reply Brief at 3 n.7). The request for reconsideration was successful, and was obviously not filed for the purpose of delay. Shell's suggestion that the MMS could have short-circuited the appeal by withdrawing its "document

production request" and issuing a subpoena instead, is counter-intuitive and has been sufficiently rebutted by the government. (Defendants' Reply Brief at 12-13)(stating that the MMS did issue a subpoena, which Shell challenged as interfering with the Third Circuit appeal).

Finally, the Court does not adopt Shell's contention that the government could have issued an Order to Pay based on an "estimated" amount without all underlying documents. Shell asserts that "the Department is not restrained. . . by any minimum factual threshold which a Department auditor must meet before issuing an order to pay." (Shell's Reply Brief at 10). The Court can only speculate as to the response of Shell (or any oil company) to an Order to Pay which was "unrestrained" by any minimum factual threshold, requiring payment of estimated royalties based on the sources of information recited in Shell's brief. It seems safe to assume the words "arbitrary and capricious" would make their appearance.

Thus, the Court finds that the six-year statute of limitation was tolled during the parties' document battle, because Shell's withholding of the documents prevented the government from having "facts material to the right of action." 28 U.S.C. §2416(c).

A subsidiary issue merits comment, although the parties have only addressed it fleetingly in asides and footnotes. As already stated, the accrual date in this case is April 30, 1988. The audit was officially commenced on July 18, 1996, over eight years later. No statutory mandate requires the government to commence an audit

within a certain time. Some courts have considered 30 U.S.C. §1713, which requires the lessee to maintain records for six years, subject to extension if an audit is requested. In Marathon Oil Co. v. Babbitt, 938 F.Supp. 575 (D.Alaska 1996), the court said this provision "strongly suggests that Congress considers an audit within six years reasonable. . . ." Id. at 580 n.11. In Phillips Petroleum v. Lujan, 4 F.3d 858 (10th Cir.1993), the Tenth Circuit sought to "provide the district court with some guidance in making its reasonableness determination. . . ." Id. at 863. The court also referred to §1713 and the six-year record-keeping requirement. The court said "[a]lthough we do not believe §1713(b) defines what is reasonable in every context under §2416(c), it is clear that if the government fails to initiate an audit within six years after the records were generated, the delay is per se unreasonable." Id. at 864.

As the government notes, in Mobil Exploration & Producing U.S., Inc. v. Dept. of the Interior, 180 F.3d 1192 (10th Cir.1999), the Tenth Circuit labeled this language as dictum. Id. at 1202. However, since this language in Phillips was expressly directed toward "guidance" of a district court in its reasonableness determination, this Court is not prepared to completely disregard it. Indeed, the court in Mobil Exploration acknowledged that Phillips was addressing the tolling of the six-year statute of limitation in an action to collect unpaid royalties (as in the case at bar), as distinguished from the action in Mobil Exploration involving document retention. Id.

A question unanswered by case law is, if this Court were to accept "guidance" from the statement in Phillips that audit commencement more then six years after record generation is "per se unreasonable", what is the effect? Since the Order to Pay is based upon the audit, does this operate to nullify an action for royalty collection, even if the Court has found that §2416(c) otherwise applies? The government essentially views the entire time period from claim accrual to the issuance of an order to pay as a single unit. "Thus, as a matter of law, the MMS has at least twelve years from the date the MMS's right of action accrues to issue an order to pay - six years to initiate and conduct an audit before the six year limitations period begins to run." (Defendants' Opening Brief at 34)(emphasis added). Twelve years strikes this Court as an extraordinarily long time depending upon the facts of a case and the Court declines to adopt it as "a matter of law."

Here, the claim accrued in April, 1988 and the initial document request was made in April, 1990. See Shell Oil Co. v. Babbitt, 125 F.3d 172, 175 (3rd Cir.1997). This two-year interim the Court does not find unreasonable, and the Court has ruled that the ongoing document battle tolled the statute of limitation. However, it is unclear from the record why the government waited until July, 1996 to commence the audit. At one point, the defendants state "the MMS could not audit here until Shell produced requested documents." (Defendants' Reply Brief at 7 n.2). This must be a misstatement of some sort. The Third Circuit did not issue its decision in Shell, 125 F.3d 172, ordering Shell to turn

over the long-contested documents, until September 19, 1997. The MMS had commenced its audit over a year earlier.

The Tenth Circuit stated in Phillips "[t]he time consumed before initiating and completing the audit is not within the government's discretion...." 4 F.3d at 863 (emphasis added). But in the preceding sentence, the court stated "[i]n the majority of royalty disputes, however, the government will need to conduct an audit to discover that a breach occurred." The Court finds the audit was completed within a reasonable time after initiation. In the absence of Tenth Circuit authority on point, the Court declines to find that violation of a court-created "reasonableness" standard as to audit commencement, standing alone, serves to bar an otherwise timely action for collection of unpaid royalties. Statutes of limitation which bar the government's rights must be given a strict construction in the government's favor. United States v. Hess, 194 F.3d 1164, 1175 (10th Cir.1999). The Court believes it has complied with this principle. The challenged Order to Pay is timely.

Plaintiff has also filed a motion to strike portions of a declaration by Donald Sant (Deputy Associate Director of MMS) presented by defendants in support of their summary judgment motion. The Court has not relied upon Sant's declaration in making its decision, but in any event finds plaintiff's motion not well-taken and therefore denied.

It is the Order of the Court that the motion of the plaintiff for summary judgment (#34) is hereby DENIED and the motion of the defendants for summary judgment (#29) is hereby GRANTED. Plaintiff's motion to strike (#53) is DENIED. All other motions are DENIED as moot.

ORDERED this 26 day of July, 2000.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DAVID KUYKENDALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 97-CV-0537-K (E)**
	)	
STEVE HARGETT, Warden,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner David Kuykendall filed a Petition for Writ of Habeas Corpus (Dkt. # 1). Petitioner's federal habeas petition was transferred to this Court from the Western District of Oklahoma. This case was referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636, and 28 U.S.C. § 2254, Rules 8, 10. For the reasons set forth below, the undersigned recommends that the Petition for Writ of Habeas Corpus (Dkt. #1) be **DENIED**.

BACKGROUND AND PROCEDURAL HISTORY

Acting *pro se*, petitioner challenges the concurrent life sentences he received after pleading guilty to two counts of Rape in the First Degree After Former Conviction of Two or More Felonies, and one count of Forcible Sodomy, After Former Conviction of Two or More Felonies. Petitioner testified at the plea hearing that "I was at the bar. She picked me up and she gave me a ride home. I lived at 1223 South College and we parked and went inside and I was drinking and I raped her . . . ." (Resp. Br., Dkt # 5, Ex. D, at 6, ll. 17-20.) He also stated "I made her have sex with me, " and "[I] made her take her clothes off. I threatened her." (Id. at 6, l. 24 - 7, l. 2.) He also testified that he injured the victim by hitting her eye with his hand because "I guess I wanted to rape her and . . .

[a]fter that then I forced her to have -- sodomize me." (Id. at 7, ll. 14- 25.) He agreed that he "forced her to commit oral sodomy" and it was "against her will." (Id. at 8, ll. 3-7.) Then he testified that he raped her again against her will, after the sodomy, when he "back-handed her again" and "threatened to kill her." (Id. at 8, ll. 8-22.) Photographs of the victim showed severe bruising and injuries. (Resp. Br., Dkt. # 5, Ex. E, ¶4.)

The District Court of Tulsa County, State of Oklahoma accepted petitioner's guilty plea and sentenced him in Case No. CF-90-3877 on November 19, 1990. Petitioner filed an application for post-conviction relief on December 9, 1996. On January 21, 1997, the District Court of Tulsa County denied petitioner's application for post-conviction relief, and the Oklahoma Court of Criminal Appeals ("OCCA") affirmed on April 7, 1997 (Case No. PC-97-218). The OCCA found that petitioner failed to establish any sufficient reason for his failure to file an application to withdraw his guilty plea or to appeal his conviction, and therefore, petitioner had waived any issues which could have been raised in an application to withdraw guilty plea or an appeal of his conviction. (Resp. Br., Dkt. # 5, Ex. C.)

As grounds for his habeas petition, petitioner claims that: (1) he was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel; (2) the trial court failed to advise petitioner of his right to have counsel file a timely motion to withdraw his guilty plea; and (3) the trial court erred by denying his application for post-conviction relief without a hearing, without the files and record, and without expressly stating the court's findings and conclusions of law, thus failing to adjudicate the matter on the merits. Respondent argues that the petitioner's failure to comply with the state procedural rule bars the petitioner from raising his claims before this Court, and that, in any event, petitioner was not denied the effective assistance of counsel.

DISCUSSION AND LEGAL ANALYSIS

I.

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 101 (1996). The AEDPA's amendments to 28 U.S.C. § 2254 became effective on April 24, 1996. Since petitioner's state conviction became final prior to the enactment of the AEDPA, he had one year from April 24, 1996, to file an application for federal habeas relief. See 28 U.S.C. § 2244(d)(1); Hoggro v. Boone, 150 F.3d 1223, 1225 (10th Cir. 1998). Petitioner filed his application on April 21, 1997, within the one-year limitations period. The AEDPA established a more deferential standard of review of state court decisions in habeas corpus cases.

Under the AEDPA, a federal court may entertain an application for writ of habeas corpus from a prisoner held in state custody only on the ground that the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §§ 2241, 2254(a). In cases governed by the AEDPA,

> [t]he appropriate standard of review depends on whether a claim was decided on the merits in state court. "If the claim was not heard on the merits by the state courts, and the federal district court made its own determination in the first instance, we review the court's conclusions of law de novo and its findings of fact if any, for clear error." LaFevers v. Gibson, 182 F.3d 705, 711 (10th Cir. 1999). If a claim was adjudicated on its merits by the state courts, a petitioner will be entitled to federal habeas relief only if he can establish that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S. C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings," id., § 2254(d)(2). Thus, we may grant the writ if we find the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; decided the case differently than the Supreme

> Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the facts of the prisoner's case. Williams v. Taylor, __ U.S. __, 120 S. Ct. 1495, 1523, 146 L.Ed.2d 389 (2000).

Van Woudenberg ex rel. Foor v. Gibson, 211 F.3d 560, 566 (10th Cir. 2000); see also Paxton v. Ward, 199 F.3d 1197, 1204 (10th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1178 (10th Cir. 1999). To grant the writ, the Court must be convinced that the application was objectively unreasonable. Van Woudenberg, 211 F.3d at 567 n. 4. Otherwise, a federal habeas court owes "deference to the state court's result, even if its reasoning is not expressly stated." Id. at 569 (quoting Aycox, 196 F.3d at 1177) (summary decision can constitute adjudication on the merits if decision was reached on substantive rather than procedural grounds).

II.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 729 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an "adequate" state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)). The OCCA routinely refuses to hear all claims brought for the first time in an application for post-conviction relief, including ineffective assistance claims, if those claims could have been raised on direct appeal, but were not. E.g., Smallwood v. Gibson, 191 F.3d 1257, 1267 and 1269 n. 8. (10th Cir. 1999), cert. filed, No. 99-9445 (March 9, 2000). The basis for this particular procedural bar is the following statutory provision:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

Okla. Stat. tit. 22, § 1086. In this matter, the OCCA also relied on Okla. Stat. tit. 22, ch. 18, app., Rules of the Court of Criminal Appeals, Rule 4.2, specifically regarding procedures for appeal from a plea of guilty. Where the OCCA bases its decision on independent and adequate state procedural grounds, this Court need not find that petitioner's claims are procedurally defaulted if petitioner can demonstrate cause for the procedural default (petitioner's failure to file a timely withdrawal of plea or appeal) and actual prejudice, or that the Court's refusal to consider the merits of his claims will result in a fundamental miscarriage of justice. See, e.g., Coleman, 510 U.S. at 750.

The cause standard requires a petitioner to show "something external to [himself], something that cannot fairly be attributed to him . . ." that prevented him from complying with the state procedural rules. See Coleman, 510 U.S. at 753; Demarest v. Price, 130 F.3d 922, 941 (10th Cir. 1997) (both cases citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). "Adequate cause includes interference by officials which makes compliance with a state's procedural rule impracticable, demonstration of unavailability of a factual or legal basis, or constitutionally ineffective assistance of counsel in not bringing a claim." Worthen v. Kaiser, 952 F.2d 1266, 1268 (10th Cir. 1992). Once cause is established, the petitioner must then show that he suffered "actual prejudice" as a result of the alleged violations of federal law. E.g., Demarest, 130 F.3d at 941. To show "prejudice," petitioner must demonstrate "not merely that errors at . . . trial created a possibility of prejudice, but

that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray, 477 U.S. at 488; see also United States v. Frady, 456 U.S. 152, 168 (1982).

Petitioner claims that he did not timely seek to withdraw his plea or appeal his conviction because "neither counsel nor the trial judge advised petitioner of his vested right to counsel to file a timely motion to withdraw guilty plea and/or appeal." (Pet., Dkt. # 1, at 2.) Petitioner was represented at the plea hearing by counsel. The trial judge advised the defendant that he had a right to withdraw his guilty plea and a right to appeal his conviction. (Resp. Br., Dkt # 5, Ex. D, at 10, ll. 12-22).[1] Under Oklahoma law, it is trial counsel's responsibility to file the application to withdraw his guilty plea and to represent the defendant during the evidentiary hearing on the application if and when a defendant decides to attempt the withdrawal. Okla. Stat. tit. 22, § 1363 (1991). However, petitioner has presented no authority, and this Court is aware of none, which requires a trial judge to specifically advise a defendant of trial counsel's responsibility to file the application upon request by defendant.

Further, petitioner's counsel had no absolute duty to file a motion to withdraw the guilty plea or to advise petitioner whether he had meritorious grounds for withdrawing the guilty plea. Counsel has a duty to inform the defendant of his limited right to appeal a guilty plea only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right . . . ." Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th

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[1] To appeal from a guilty plea, a defendant must file an application to withdraw the plea within ten days of judgment. See Okla. Stat. tit. 22, ch. 18, app., Rules of the Court of Criminal Appeals, Rule 4.1. If the motion is denied, the conviction may be appealed within ninety days of conviction by a petition for writ of certiorari to the Oklahoma Court of Criminal Appeals. See Okla. Stat. tit. 22, § 1051(a).

Cir.1989). As the Supreme Court has recently explained, "[c]ounsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interest in appealing." Roe v. Flores-Ortega, __ U.S. __, 120 S. Ct. 1029, 1036 (2000). Whether a defendant's conviction follows a trial or a guilty plea is a highly relevant factor, "both because a guilty plea reduces the scope of potentially appealable issues and such a plea may indicate that the defendant seeks an end to judicial proceedings. Even when defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id. at 1036.

Petitioner has not demonstrated that his counsel failed to advise him of his right to withdraw his guilty plea, his right to appeal, or his right to have counsel file the appropriate motions. Oliver affied that he and petitioner discussed before and after the plea hearing that petitioner "had ten (10) days thereafter to file an appeal of his plea or a jury verdict." (Resp. Br., Dkt. # 5, Ex. E, ¶¶ 11, 12.) Petitioner never advised his counsel that he wanted to withdraw his plea or that he wanted to appeal, despite numerous opportunities to do so. (Id. at ¶¶ 11, 12, 13.) Nor did petitioner ever exercise those rights on his own within the statutory 10-day period. Petitioner has no evidence that his

counsel abandoned the case during that 10-day period, and counsel specifically denies any such abandonment. (Id.)[2]

Petitioner demonstrated no interest in appealing, and there was no reason for Oliver to think that a rational defendant would want to appeal, given the facts incriminating petitioner and petitioner's statements at the plea hearing. Although the plea does not expressly reserve or waive some or all appeal rights, petitioner received the sentence for which he bargained. Petitioner has not demonstrated cause or prejudice sufficient to excuse his failure to timely withdraw his guilty plea or appeal. Likewise, petitioner's remaining allegations of ineffectiveness of counsel are insufficient to overcome the procedural bar.

Constitutionally ineffective assistance of counsel may constitute cause for procedural default. See, e.g., Coleman, 501 U.S. at 753-55. However, the Tenth Circuit has stated that

> no state procedure for resolving claims of ineffective assistance will serve as a procedural bar to federal habeas review of those claims unless the state procedures comply with the imperatives set forth in [Kimmelman v. Morrison, 477 U.S. 365 (1986)]: (1) allowing petitioner an opportunity to consult with separate counsel on appeal in order to obtain an objective assessment of trial counsel's performance and (2) providing a procedural mechanism whereby a petitioner can adequately develop the factual basis of his claims of ineffectiveness.

English v. Cody, 146 F.3d 1257, 1262-63 (10th Cir. 1998) (footnotes omitted). Citing Okla. Stat. tit. 22, § 1086, the Tenth Circuit has recognized that "Oklahoma generally bars review in

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[2] Thus, to the extent petitioner attempts to set forth a claim of presumed ineffective assistance of counsel, as distinguished from actual ineffective assistance of counsel, his claim fails. Presumed ineffective assistance exists when counsel has an actual conflict of interest and when there is a total absence of counsel during a critical stage of the proceedings. See United States v. Cronic, 466 U.S. 648, 659 n.25 and 662 n. 31 (1984); Holloway v. Arkansas, 435 U.S. 475, 484 (1978). Petitioner has not shown that his counsel was absent during the critical 10-day period after his conviction.

postconviction proceedings of ineffective assistance of trial counsel claims not raised on direct appeal." Hooks v. Ward, 184 F.3d 1206, 1213 (10th Cir. 1999).

The English court held that if trial counsel and appellate counsel are the same, the OCCA's waiver rule can never be "adequate" as to ineffective assistance of counsel claims. 146 F.3d at 1264. If trial and appellate counsel differ, the OCCA's waiver rule will be "adequate" if "the ineffectiveness claim can be resolved upon the trial record alone." Id. The English court found that the procedural posture of the cases before it prevented it from determining whether the claims required supplementation of the record or additional fact-finding. It remanded for such a determination, and, if necessary, a determination of whether the applicable Oklahoma remand procedure (Okla. Stat. tit. 22, ch. 18, app., Rules of the Court of Criminal Appeals, Rule 3.11) was adequate. Id. The Hooks court reviewed the English decision and remanded for a similar determination, noting that the state must raise the procedural default as an affirmative defense. Hooks, 184 F.3d at 1216-17. Thereafter, the petitioner must place the defense at issue by specific allegations as to the inadequacy of the state procedure. The state's burden of proving the adequacy of a state procedural bar is then measured by the petitioner's claims. Id. at 1217.

It is unclear whether the state procedural bar in this instance is adequate to preclude habeas review because petitioner did not file a direct appeal; thus, he had no appellate counsel. Oliver made himself available, but petitioner never indicated to him that he wanted to file a direct appeal. Yet, petitioner never placed the adequacy of the procedural bar at issue. The Hooks court excused the failure of the petitioner in that case to raise the issue because he filed his decision prior to the decision in English. Hooks, 184 F.3d at 1217. Petitioner in this matter also filed his brief before the

decision in English. Accordingly, the merits of petitioner's ineffective assistance of counsel claim are examined below.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. To prevail on an ineffective assistance of counsel claim, petitioner must show that his counsel's performance was deficient, and that the deficient performance was prejudicial. See Strickland v. Washington, 466 U.S. 668, 687 (1984). To show constitutionally deficient performance, petitioner must show that his attorney "committed serious errors in light of prevailing professional norms such that his legal representation fell below an objective standard of reasonableness." Castro v. Ward, 138 F.3d 810, 829 (10th Cir.)(quotations omitted), cert. denied, 525 U.S. 971 (1998); accord Moore v. Reynolds, 153 F.3d 1086, 1096 (10th Cir. 1998). To show prejudice, he must demonstrate "a reasonable probability that the outcome would have been different had those errors not occurred." Castro, 138 F.3d at 829 (quotations omitted); see also Moore, 153 F.3d at 1096.

The Court is to presume that the conduct of petitioner's counsel falls within the range of reasonable professional assistance, and petitioner must overcome the presumption. Strickland, 466 U.S. at 689; Moore, 153 F.3d at 1096. If petitioner fails to establish either the performance or prejudice prong of the Strickland test, the ineffective assistance claim fails. Strickland, 466 U.S. at 687. "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Courts must "judge the reasonableness of counsel's conduct on the facts of a particular case, viewed as of the time of counsel's conduct." Id. at 690. Petitioner sets forth thirteen allegations of ineffectiveness, although many of these allegations overlap or duplicate others. These claims

generally fall into the following categories: failure to investigate, coercion, and failure to advise defendant of his right to appeal.

The Sixth Amendment imposes on counsel "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; see also James v. Gibson, 211 F.3d 543, 557 (10th Cir. May 2, 2000) (citing Stouffer v. Reynolds, 168 F.3d 1155, 1167 (10th Cir. 1999)). The Court focuses on the reasons for counsel's decision not to present available mitigating evidence, and "[t]he reasonableness of counsel's actions not to present evidence may be determined or influenced by the petitioner's actions or statements." James, 211 F.3d at 557.

Petitioner claims that his attorney failed to investigate the statements of the alleged victim and develop alibi evidence of innocence after petitioner advised him that he did not commit the crimes. Oliver submitted an affidavit in which he points out that petitioner was nude when he was arrested at the scene of the crime after the victim, who was also nude, ran out of petitioner's small apartment into the arms of police officers. (Resp. Br., Dkt.# 5, Ex. E, ¶¶1, 8.) An alibi defense was not available. Trial counsel is not under a duty to investigate an unreasonable defense theory. See Clayton v. Gibson, 199 F.3d 1162, 1178 (10th Cir. 1999), cert. filed, No. 99-9630 (May 20, 2000).

Petitioner also claims that Oliver failed to investigate (non-legal) mitigating evidence, although he does not specifically identify what non-legal mitigating evidence existed, if any. Oliver affied that petitioner never indicated the existence of any non-legal mitigating evidence to him or to the trial judge. (Resp. Br., Dkt. # 5, Ex. E, ¶ 2.) Similarly, there is no evidence that petitioner "was unconscious from alcoholism at the time the state alleged the offenses occurred." (Pet., Dkt. # 1, Attachment to p. 4, at 1, ¶ 3.) Oliver affied that he discussed a voluntary intoxication defense

with petitioner, but petitioner chose to plead guilty to gain the benefit of concurrent sentences and dismissal of two other counts. (Resp. Br., Dkt. # 5, Ex. E., ¶¶ 2, 3.) As in Laycock, the petitioner "has not shown that he supplied counsel with facts necessary to raise such a defense or that counsel was unreasonable in deciding to recommend a plea agreement instead." 880 F.2d at 1187.

Petitioner's claim that Oliver should have filed a motion to have petitioner committed to Eastern State Mental Hospital for psychiatric examination due to his alleged intoxication at the time of the offenses is similarly invalid. Under Ake v. Oklahoma, 470 U.S. 68 (1985), a defendant is entitled to psychiatric assistance to aid his defense at trial with regard to competency, insanity, and mitigation of punishment. Id. at 74. However, the defendant must demonstrate that his mental state at the time of the offense would be a significant factor at trial, thus warranting the need for psychiatric testimony. See id. Petitioner made no such showing and presents no evidence in this proceeding to support an intoxication defense. "[A]lleged temporary, voluntary intoxication does not constitute the mental defect required for a valid insanity defense." James, 211 F.3d at 553.[3] Counsel's failure to request a psychiatric examination was not deficient. See Smith v. Gibson, 197 F.3d 454, 462-63 (10th Cir. 1999), cert. filed, No. 99-9652 (May 19, 2000).

Petitioner has presented no evidence to support his allegation that Oliver failed to investigate forensic evidence and interview the arresting officers or that he failed to file pretrial motions for discovery requesting exculpatory evidence. In fact, the evidence is to the contrary. Oliver affied that he sent letters to interview witnesses and he filed motions to produce to which the prosecution

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[3] As explained in James, Oklahoma applies the M'Naghten test for legal insanity, which requires a defendant to show that, at the time of the crime, he suffered from "a mental disease or defect rendering him unable to differentiate between right and wrong, or unable to understand the nature and consequences of his actions." Id. (quoting Jones v. State, 648 P.2d 1251, 1254 (Okla. Crim. App. 1982)).

responded. (Resp. Br., Dkt. # 5, Ex. E, ¶¶ 4, 5). Likewise, petitioner has no basis for his claim that Oliver failed to investigate the validity of the prior convictions or to suppress prior convictions. Oliver filed two motions to dismiss, a motion in limine, and a motion to suppress petitioner's prior convictions. (Id. at ¶ 7.) The plea hearing transcript confirms that the trial judge questioned petitioner about the prior convictions, and petitioner admitted that he was previously convicted of six prior felonies. (Id., Ex. D, at 9, ll. 13-22).

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citations omitted). To prevail on a challenge to a counseled guilty plea based on ineffective assistance of counsel, the petitioner must identify particular acts and omissions of counsel tending to prove that counsel's advice was not within the wide range of professional competence. Hill, 474 U.S. at 59 (applying the two-pronged performance and prejudice test of Strickland for evaluating claims of ineffective assistance of counsel); see also Laycock, 880 F.2d at 1187. Petitioner must also show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59; Laycock, 880 F.2d at 1187. Coercion invalidates a guilty plea entered upon the advice of counsel. Osborn v. Shillinger, 997 F.2d 1324, 1327 (10th Cir. 1993).

There is no evidence that Oliver coerced petitioner into entering the plea agreement, as petitioner contends. The plea hearing transcript clearly indicates that the trial judge questioned petitioner about whether he was coerced, and petitioner denied any coercion. Indeed, petitioner stated that no one had forced him to enter the plea against his will. (Resp. Br., Dkt # 5, Ex. D, at

3, ll. 13-15.) Twice, he agreed that he was pleading guilty because he was guilty "and for no other reason." (Id. at 9, ll. 7-9, 23-25.) Petitioner's allegation of coercion is without merit.

As part of his claim that Oliver coerced him, petitioner claims that the trial judge failed to establish a factual basis for the guilty plea. As set forth above and in the plea hearing transcript, petitioner has no basis for this contention. (See id.) Petitioner is bound by his "'solemn declarations in open court' and his unsubstantiated efforts to refute that record [are] not sufficient to require a hearing" so that a factual basis for his plea can be developed. See Lasiter v. Thomas, 89 F.3d 699, 703 (10th Cir. 1996).

Counsel's failure to file notice of appeal without defendant's consent is not *per se* deficient. Flores-Ortega, 120 S. Ct. at 1034. Where a defendant does not instruct counsel to file an appeal or ask that appeal not be taken, the Court determines whether counsel consulted with defendant about an appeal. If counsel consulted with the defendant, counsel performed in professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to the appeal. If counsel did not consult with the defendant, the Court must determine whether counsel's failure to consult with the defendant itself was deficient performance. Flores-Ortega, 120 S. Ct. at 1035.[4]

As discussed above, Oliver affied that he and petitioner discussed before and after the plea hearing that petitioner had ten (10) days thereafter to file an appeal of his plea or a jury verdict. (Resp. Br., Dkt. # 5, Ex. E, ¶¶ 11, 12.) The plea hearing transcript also shows that the trial judge

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[4] Since there is no evidence that petitioner was denied counsel after the plea hearing, petitioner cannot rely on any presumption of prejudice from counsel's alleged failure to consult with him about appeal. See Flores, 120 S. Ct. at 1038.

his guilty plea. (Id., Ex. D, at 10, ll. 12-22). Yet, within that 10 days, petitioner never indicated that he wanted to withdraw his plea or that he wanted to appeal. (See id., Ex. E, ¶¶ 11, 12, 13.) Petitioner has not shown that he was somehow prevented from communicating with counsel or exercising his right to withdraw his plea or to appeal his conviction.

Petitioner asserts that Oliver "breached his duty" to advise petitioner of (1) his right to have counsel file his motion to withdraw his guilty plea or appeal, (2) his right to a "free appeal, including case made at the expense of Tulsa County," and (3) that he had 10 days from the date of judgment and sentencing to file a notice of appeal. (Pet., Dkt. # 1, Attachment to p. 4, at 2.) Petitioner does not contend that he did not know of these rights or that he would have filed such a petition if he had known. He has not shown that he attempted or wanted to exercise these rights. Petitioner has not demonstrated any "reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." See Flores, 120 S. Ct. at 1038. He cannot make a successful ineffective assistance of counsel claim on this ground.

Petitioner cannot show cause or prejudice based on his third claim[5] because any failure of the trial court in denying his application for post-conviction relief occurred after the time expired for him to file a motion to withdraw guilty plea or to appeal his conviction, and, by definition, cannot serve as a basis for failure to comply with state procedural rules for withdrawal of plea or appeal. However, the Court could reach the third issue if petitioner is able to show that the second prong of the procedural default analysis applies, i.e., that the Court's refusal to consider the merits of the

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[5] Petitioner's third claim is that he was "denied due process when the trial court clearly erred and abused its discretion by arbitrarily denying his application for post-conviction relief without a hearing and without the files and record and without expressly stating the court's findings and conclusions of law . . . ." (Pet., Dkt. # 1, Attachment to p. 4, at 3.)

claim will result in a fundamental miscarriage of justice. To come within this "very narrow" exception, petitioner must make a "colorable showing" that he is factually innocent of the crime of which he was convicted. Schlup v. Delo, 513 U.S. 298, 311 (1995) (citing Kuhlman v. Wilson, 477 U.S. 436, 454 (1986)). Factual innocence requires a stronger showing than that necessary to establish prejudice. Schlup, 513 U.S. at 326. Such a showing does not in itself entitle the petitioner to relief but instead serves as a "gateway" which then entitles petitioner to consideration of the merits of his claims. Id. at 327.

Petitioner does not expressly claim that he is innocent of the rape and sodomy crimes to which he pleaded guilty. Rather, he claims that his counsel was ineffective for not developing his alibi defense and investigating his claims that he was "unconscious from alcoholism" at the time of the offenses. He states that his counsel advised him that he had to plead guilty even though petitioner maintained his innocence. (Pet., Dkt. # 1, Attachment to p. 4, at 1.) These arguments go to legal innocence, not factual innocence. Cf. Beavers v. Saffle, No. 99-6154, 2000 WL 775582, *3 (10th Cir. June 16, 2000); Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995); Brecheen v. Reynolds, 41 F.3d 1343, 1357 (10th Cir. 1994).

Plaintiff has not offered any evidence of innocence. His counsel affied that petitioner had no alibi defense, given that petitioner was nude at the scene of the crime when officers arrested him. (Resp. Br., Dkt.# 5, Ex. E, ¶¶1, 8.) Further, petitioner testified at the plea hearing as to details of the offenses, thereby negating any claim that he was too intoxicated to remember anything, much less commit the crimes. (Id., Ex. D, at 6-8.) The fundamental miscarriage of justice exception is limited to "those rare situations 'where the State has convicted the wrong person of the crime. . . . [or where]

it is evident that the law has made a mistake." Klein, 45 F.3d at 1400 (citation and quotation omitted). The exception does not apply here.

III.

Nonetheless, the Court may not ignore petitioner's third claim because, even though petitioner presented it to the OCCA, the OCCA did not address this issue or explain how it could have been raised in an application to withdraw guilty plea or in an appeal of his conviction. (See Resp. Br., Dkt. # 5, Ex. C.) Nor did respondent address this issue in his brief. In any event, the issue warrants little attention because petitioner has not shown that he was entitled to a hearing, that the trial judge ruled without viewing the files and record, or that the trial judge failed to state findings and conclusions of law. To the contrary, the decision of the trial judge expressly stated that the matter did not present any genuine issue of material fact requiring a formal hearing. (Resp. Br., Dkt. # 5, Ex. A3 (citing Johnson v. State, 823 P.2d 370 (Okla. Crim. App. 1991)). The opinion also sets forth his findings of fact and conclusions of law in detail. (Id.) Petitioner was not entitled to a hearing in state court, and he is not entitled to one in federal court.

Under the AEDPA, a habeas petitioner is not entitled to an evidentiary hearing where he has failed to develop the factual basis of a claim in state court unless certain criteria are met. The applicable provision provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Petitioner does not meet the criteria.

Further, he has not shown that he "diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so." Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998). His allegations are contravened by the existing factual record. Id. Petitioner was convicted in 1991. He did not file a motion to withdraw his guilty plea or a direct appeal, and he waited until 1997 to file an application for post-conviction relief. It appears that the one-year deadline imposed by the AEDPA may have spawned his application -- not a new rule of constitutional law or previously undiscoverable facts that came to light prior to his application.

CONCLUSION

For the reasons cited herein, the undersigned recommends that the Petition for Writ of Habeas Corpus (Dkt. # 1) be **DENIED**.

OBJECTIONS

Within ten days after being served with a copy of this Report and Recommendation, a party may serve and file specific, written objections with the Clerk of the District Court. 28 U.S.C. § 636(b)(1); Rules Governing § 2254 Cases in the United States District Courts; Rule 8(b). If such objections are timely filed, the District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. Id. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. If no objections are timely filed, the District Court may adopt the Report and Recommendation without any review. **The**

failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999); United States v. One Parcel of Real Property, 73 F.3d 1057 (10th Cir. 1996).

Dated this 24th day of July, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 24th Day of July 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 25 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMERICAN PROTECTION INSURANCE COMPANY,

Plaintiff,

vs.

SILVERADO FOODS, INC.,

Defendant.

Case No. 99-CV-0934-H (J)

ENTERED ON DOCKET

DATE JUL 26 2000

DEFAULT JUDGMENT
(Attorney Fees)

This cause came before the Court on the motion of plaintiff, American Protection Insurance Company ("American"), for an award of attorney fees against defendant, Silverado Foods, Inc., pursuant to Fed. R. Civ. P. 54(d)(2) and 12 *Okla. Stat.* § 936. The Court, having reviewed the motion of plaintiff and the affidavits of Thomas M. Ladner and Richard M. Hoffman, and the supporting documentation, and finding that defendant is in default, finds that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment should be and is hereby entered in favor of American Protection Insurance Company against Silverado Foods, Inc. for attorney fees in the total amount of $14,222.50.

IT IS SO ORDERED, ADJUDGED AND DECREED this 25TH day of July, 2000.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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clmvt

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 26 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

KEVIN W. NORMAN;
KAREN BRAVO NORMAN;
COUNTY TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma;
NATIONSBANK OF DELAWARE,

Defendants.

ENTERED ON DOCKET
DATE JUL 26 2000

CIVIL ACTION NO. 99-CV-0580-B (J)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26th day of July, 2000. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, NationsBank of Delaware, appears not, being dismissed from this action; that the Defendants, Kevin W. Norman and Karen Bravo Norman, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Kevin W. Norman, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on September 15, 1999; that the Defendant, Karen Bravo Norman, was served with

Summons and Amended Complaint by a United States Deputy Marshal on March 1, 2000.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on August 6, 1999; and that the Defendants, Kevin W. Norman and Karen Bravo Norman, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Fifteen (15), Block Eight (8), GLENNWOOD SOUTH, an Addition to the County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on April 11, 1994, Defendants, Kevin W. Norman and Karen Bravo Norman, executed and delivered to BancOklahoma Mortgage Corp., their mortgage note in the amount of $64,770.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Defendants, Kevin W. Norman and Karen Bravo Norman, husband and wife, executed and delivered to BancOklahoma Mortgage Corp., a real estate mortgage dated April 11, 1994, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on April 15, 1994, in Book 5615, Page 1634, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 23, 1997, Bank of Oklahoma, N.A., fka BancOklahoma Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Corporation Assignment of Mortgage was recorded on July 17, 1997, in Book 5936, Page 0489, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 26, 1997, the Defendants, Kevin W. Norman and Karen Bravo Norman, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due on that date was made principal and the interest rate changed to 8 percent per annum.

The Court further finds that Kevin W. Norman and Karen Bravo Norman, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage the principal sum of $62,766.92, plus administrative charges in the amount of $320.32, plus penalty charges in the amount of $430.32, plus accrued interest in the amount of $7,724.63 as of July 15, 2000, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $290.90 ($282.90 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), less a payment in the amount of $1,011.00 made on May 10, 2000, which has not been posted.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1997 ad valorem taxes in the amount of $1,025.82, plus penalties and interest. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1991 personal property taxes in the amount of $15.00 which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, NationsBank of Delaware, should be dismissed from this action, including its name from the style of this case, since its lien as described in the Amended Complaint has been released as shown on the Release of Judgment Lien and Release and Satisfaction of Judgment filed on February 25, 2000 in Case No. CS-99-1569-21 in the District Court of Tulsa County, State of Oklahoma.

The Court further finds that the Defendants, Kevin W. Norman and Karen Bravo Norman, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans

Affairs, have and recover judgment in rem against Defendants, Kevin W. Norman and Karen Bravo Norman, in the principal sum of $62,766.92, plus administrative charges in the amount of $320.32, plus penalty charges in the amount of $430.74, plus accrued interest in the amount of $7,724.63 as of July 15, 2000, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, plus the costs of this action in the amount of $290.90 ($282.90 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), less a payment in the amount of $1,011.00 made on May 10, 2000, which has not been posted, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $1,025.82 plus interest, by virtue of 1997 ad valorem taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $15.00 plus interest, by virtue of 1991 personal property taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Kevin W. Norman, Karen Bravo Norman, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, NationsBank of Delaware, is dismissed from this action, including its name from the style of this case, since its lien as described in the Amended Complaint has been released as shown on the Release of Judgment Lien and Release and Satisfaction of Judgment filed on February 25, 2000 in Case No. CS-99-1569-21 in the District Court of Tulsa County, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma, for ad valorem taxes;

Third:
In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma, for personal property taxes.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

WYN DEE BAKER, OBA #465
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DICK A. BLAKELEY, OBA #0852
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Tulsa, OK 74103
(918) 596-4835
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 99-CV-0580-B (J) (Norman)

WDB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 25 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EUGENE T. FOUST,

Petitioner,

vs.

RONALD J. CHAMPION,

Respondent.

Case No. 89-C-642-E

ENTERED ON DOCKET
DATE JUL 25 2000

ORDER

Now before the Court is the Amended Petition for Writ of Habeas Corpus of the Petitioner Eugene T. Foust.

Foust, who was convicted in two separate cases in Tulsa County District Court in May 1988, filed a pro se petition for writ of habeas corpus in August, 1989. This Court found that Foust was not told of the perils of self-representation, and, as a result, did not waive his right to an attorney on direct appeal. The Court therefore held the two underlying cases in abeyance for 120 days, during which time the State could either grant Foust leave to appeal out of time or a writ would issue releasing petitioner. Foust was allowed leave to appeal out of time, and both convictions were affirmed, one on June 20, 1993, and one on March 30, 1994. This court dismissed this case on March 26, 1993, finding that Foust had been allowed to appeal out of time. Foust filed a motion for rehearing, and that motion was denied on March 16, 1994.

Foust now seeks to reopen the case by filing an Amended Petition for Writ of Habeas Corpus. Because the instant case has previously been dismissed, and Foust did not appeal that dismissal, the Court finds that it is inappropriate to reopen this matter. In short, in order to bring a new claim,

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Foust must file a new lawsuit.

Foust's Amended Petition for Writ of Habeas Corpus is dismissed and his Motion to Issue Show Cause Order is Denied as Moot.

IT IS SO ORDERED THIS 24th DAY OF JULY, 2000.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 99-CR-97-C
	)	
DeMARQUES MORRIS and	)	
ELLIOT TOLES,	)	
	)	
Defendants.	)	

ORDER

Now on this 24th day of July, 2000, this cause comes on to be heard in the matter of the plaintiff's Motion for Leave to Dismiss, without prejudice, the Counts Six and Seven of the Superseding Indictment against defendants in the above styled cause. The Court finds that said request should be granted and Counts Six and Seven of the Superseding Indictment against defendants DeMARQUES MORRIS and ELLIOT TOLES are hereby dismissed without prejudice.

IT IS SO ORDERED.

H. DALE COOK
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MINTA COOPER,

Plaintiff,

vs.

CENTRAL AND SOUTHWEST SERVICES,

Defendant.

No. 99-CV-830-B

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Central and Southwest Services, and against the Plaintiff, Minta Cooper. Plaintiff shall take nothing on her claim. Costs are assessed against the Plaintiff upon timely application pursuant to N. D. LR 54.1, and each party is to pay its respective attorney's fees.

DATED THIS 24th DAY OF JULY, 2000.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MINTA COOPER,

Plaintiff,

vs.

CENTRAL AND SOUTHWEST SERVICES,

Defendant.

No. 99-CV-830-B

ORDER

The Court has for decision Defendant Central and Southwest Services' ("CSWS") Motion for Summary Judgment (Docket # 26) and the Court finds as follows:

CSWS urges summary judgment should be granted as a matter of law as to each of the three causes of action urged by former employee, Minta Cooper ("Cooper"). Cooper's first claim is brought pursuant to the Americans With Disabilities Act ("ADA"). CSWS asserts the ADA claim was not timely filed and is time barred. Alternatively, CSWS states Cooper cannot establish a primae facie case of discrimination under the ADA or present a question of material fact as to the proffered non-discriminatory reason for the discharge.

Cooper's second cause of action is for wrongful discharge in violation of the public policy of the State of Oklahoma (handicap). CSWS urges Oklahoma does not recognize this cause of action and even if it did, Cooper did not file a timely charge with the Oklahoma Human Rights Commission ("OHRC"). Additionally, CSWS states Cooper's claim fails on the merits.

Cooper's final claim is one for retaliatory discharge in violation of Oklahoma's workers'

compensation statutes which CSWS asserts fails because Cooper cannot prove a primae facie case nor present any genuine issue of material fact to dispute CSWS's proffered reason for discharge.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about

> immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Undisputed Material Facts

The Court has reviewed CSWS's statement of undisputed facts and the evidentiary material attached in support and finds the following are the undisputed material facts for the purpose of resolving this motion.[1] Where the Court was able to ascertain what material facts are being challenged by Cooper, the Court has also taken into account evidentiary material submitted by Cooper in arriving at the undisputed material facts.

1. Cooper became employed with CSWS in April 1994 at which time she was a programmer analyst, but had worked for Transok, a company held by CSWS, since 1988.

2. In March 1996, Cooper moved to the Human Resource Management Information

[1]Cooper's response brief did not comply with the requirements of N.D.LR 56.1.B in that it did not specifically reference by number the facts sponsored by CSWS with which Cooper agrees there is no dispute or list by number the facts CSWS asserts are disputed. Failure to comply with this rule results in Defendant's tendered facts being "deemed admitted." Nevertheless, the Court must balance this with the judicial abhorrence for default judgments. Plaintiff's noncompliance consequently renders the Court's job infinitely more time consuming and difficult. Repeated violation by counsel may result in sanctions, including granting summary judgments.

Services group, reporting to supervisor Rosey Arellano. Her job was as an HR Systems Analyst/Consultant. The job position summary reads as follows:

> To provide support in the implementation, installation, and maintenance of the HR systems such as PeopleSoft, Time Reporting and other systems that interface with PeopleSoft. Functions to include: analyzing HR systems [sic] customer needs and developing technical solutions in support of those needs, maintain PeopleSoft tables and organizational charts, coordinate and install new HR systems product releases and updates, coordinate modification of panels, design, develop and produce ad hoc and standard basic reports. Coordinate and review data standards, data procedures, and data definitions, coordinate security [sic] approval process, maintenance of interfaces and facilitate/support systems training. Coordinate and write programming specifications for I/S. Demonstrated ability to effectively communicate highly technical information both orally [sic] and in writing. HR Systems Analyst/Consultant will assist in the technical development of systems contributing broad technical knowledge, project leadership, and IS/Business area knowledge and experience.

3. In December 1996, Cooper began feeling discomfort and pain in her hands.

4. On January 19, 1997,Cooper submitted a proposal to Lilian Ray (Rosey Arellano's immediate supervisor) that she be permitted to work part-time. In response to this request, Ms. Ray stated that she was not sure such a situation would work, that there was no way it could be considered at that time, and that she would simply hold on to the proposal for the time being given Cooper's current work demands.

5. Cooper filed her workers' compensation claim on April 16, 1997 – during the period after Ms. Arellano had left, but before a new supervisor had been installed. Signed by Cooper, Form 3 filed in the Workers' Compensation Court attributes her injury to: "repetitive work-keyboarding."

6. On May 15, 1997, Rita Wilson became Cooper's manager.

7. Cooper described her job during the Spring of 1997 as follows:

A. A lot of phone time. I was supporting a pension project, and I was

supporting data entry that was being done at five locations, answering a lot of questions about the pension project, I was working on and talking to Hewitt, an outside vendor that was implementing the pension project, and then hours on the keyboard pulling information off that had been entered and providing reports so that we could see how much data we entered in the system.

Q. When you would field questions from the various organizations or persons that you served, would that require you at times to get on the keyboard to get information to find out -

A. Yes.

Q. You might be on the phone and on the computer at the same time?

A. Or looking at a report, stacks of reports.

8. In approximately June 1997, Cooper discussed with Ms. Wilson the fact that her hands bothered her and requested a different keyboard, which request was granted. However, Cooper did not ever receive the keyboard or follow-up on obtaining the keyboard.

9. On July 8, 1997, Cooper's request to reduce her hours was granted. She was to begin time sharing her position with Susan Garrett at the end of July.

10. The time-sharing job began on July 27, 1997.

11. At that time, Cooper does not recall discussing with Ms. Wilson or Ms. Ray that she had filed a workers' compensation claim.

12. On July 30, 1997, Cooper underwent her first medical evaluation which was performed by Dr. Garret Watts. His report relates that Cooper "spends many hours at a computer keyboard and works 60 hours a week but is starting a 20 hour job share." It also relates that Cooper told Dr. Watts "the job is stressful for her hands." His report indicates that the "patient's condition is probably related to her repetitive keyboarding activities at work." At this time, Cooper was permitted to continue to work.

13. Dr. Watts' records indicate that she was advised to return to work on July 30 but that

Cooper did not return. One week later, on August 7, 1997, and after calls to Dr. Watts' office, Cooper obtained the note from Dr. Watts taking her off work until further notice.

14. In fact, Dr. Watts' notes of the August 27, 1997, visit reflect:

> She has not worked since July 29. At the time of her last visit, I suggested that she return to work; however, she spoke to the nurse on several occasions over the following week and indicated that she did not feel she could continue due to discomfort in her hands. We issued a release to take her off work on 8/7 . . .
> The patient's findings are rather soft; however, subjective complaints are considerable.

15. Dr. Watts' notes of October 6, 1997, reflect: "most likely, she would be restricted to a maximum of 2 hours a.m. and 2 hours p.m. keyboarding activities."

16. On October 16, 1997, Cooper was released to work with the following restrictions: "No use of keyboard. Verbal training of new employees." This restriction did not have a duration but simply advised that a re-evaluation would occur on November 5, 1997.

17. On or about November 1, 1997, Cooper returned to work on restricted basis.

18. Ms. Wilson was on leave in November and returned sometime in December 1997.

19. On November 5, 1997, Dr. Watts issued new work restriction: "No use of keyboard." Again, no duration was given. This time, however, it indicated no re-evaluation for 3 months. However, Cooper returned to Dr. Watts on December 10, 1997, at which time he released Cooper for one hour of keyboarding per day. Dr. Watts was aware that Cooper was working a four hour day at the time.

21. On December 22, 1997, CSWS sent a letter and a copy of Cooper's job description to Dr. Watts asking that he provide more information in light of her job duties.

22. On December 30, 1997, while Cooper was on vacation leave, Ms. Wilson sent a letter to Cooper which reads as follows:

I wanted to let you know not to report to work until I receive further medical information regarding your prognosis and advise you to do so. One hour a day on the keyboard is not providing the amount of support needed and we do not have other significant work available.

23. On January 7, 1998, and in response to CSWS's letter of December 22, Dr. Watts wrote a report in which he stated:

"At this point, I doubt that she will be able to return to full, non-restricted duty as an HR System Analyst/Consultant. She is scheduled to recheck in March of 1998 at which time I will review her condition and consider increasing her keyboard allowance to greater than one hour daily. I anticipate that she might eventually be able to perform heavy keyboard usage approximately half the time while she is at work."

24. On February 13, 1998, and in light of Dr. Watts' report, Ms. Wilson contacted Cooper about potential accommodations which might allow her to remain employed with CSWS.

25. On or about February 27, 1998, Cooper and Ms. Wilson spoke during which Ms. Wilson asked Cooper to identify some accommodations which might permit Cooper to work at CSWS.

26. Cooper taped two conversations with Ms. Wilson in which they discussed her position and accommodations.

27. On March 20, 1998, Human Resources Manager Randy Moses wrote Cooper confirming that Ms. Wilson had asked Cooper to identify any accommodations and that Cooper had not suggested any. Mr. Moses also placed Cooper on leave under the Family and Medical Leave Act.[2] The letter advised:

During that time, if your medical condition warrants and you provide supporting medical documentation, you may return to your normal job duties. Alternatively, you may devote attention to seeking another position within the organization consistent with

---

[2]The 12 week leave would expire on June 12, 1998.

your physical condition and job skills. Please let me know if you are interested in considering available openings so that I can mail listings to you.

If at the end of the 12 week period you are unable to return to your normal job duties or you have not been placed in another position consistent with your physical condition and job skills, your employment with Central and South West will be terminated.

28. Ten days later, on March 30, 1998, Cooper again saw Dr. Watts. His report indicates an in-depth discussion with Cooper about work:

> We held a long discussion regarding her prognosis. She does not intend to seek full time employment at this time. She is possibly interested in a trial of returning to work without keyboarding restrictions just to see if she can do it. I suspect her symptoms would flare if she tried that; however, it would not hurt to try it for several weeks. Another option is to continue to avoid any type of work requiring repetitive keyboarding activities. That would require that she would redirect her potential avenues of employment since she has done this type of work for most of her adult career . . . I advised Minta to consider her options and let me know how she wishes to proceed. If she wants to try the return to work approach, I will be happy to issue a release after she contacts our office.

Cooper never requested a release.

29. On May 27, 1998, CSWS forwarded to Cooper a listing of current job openings.

30. On June 12, 1998, Cooper was discharged from CSWS "because [she] did not return to [her] normal job duties and [she] was not placed in another position consistent with [her] physical condition and job skills." A letter confirming the discharge as being effective as of June 12, 1998 was sent to Cooper on July 8, 1998.

31. When discharged, Cooper was still receiving temporary total disability ("TTD") benefits through the workers' compensation system.

32. At no time before her discharge did Cooper obtain a full release to return to work at CSWS.

33. At no time did Cooper apply for any of the jobs open at CSWS.

34. Cooper never discussed possible accommodations with her physician, Dr. Watts.

> Q. Did you talk with Dr. Watts about any of the accommodations that might be made available to allow you to do any of the jobs at CSW[S]?
> A. No. In relation to accommodations I asked the Workers' Comp attorney how I should handle that since those were not the terms I understood and they said that accommodations would come whenever I had a permanent physical restriction, that right now I was just working with a temporary one and I should be able to keep my job so that's what I did.

35. Two months after the effective date of her discharge, on August 12, 1998, Cooper again visited Dr. Watts. In that report Dr. Watts indicates that, even with treatment, "there is no guarantee that she would be able to return to repetitive stressful usage of her hands similar to work that she was doing as a systems analyst." She was placed on permanent restrictions of avoiding repetitive keyboard activities with a maximum of 2 hours a.m. and 2 hours p.m.

36. On October 21, 1998, Cooper saw Dr. McKenzie for an independent medical evaluation at the request of Cooper's workers' compensation attorney. "The history for [his] report was taken directly from the claimant, and from review of medical records . . ., and from a review of a Form 3 from the Workers' Compensation Court . . ." Dr. McKenzie's report notes that Cooper's job at CSWS "required repetitive use of her hands while operating a computer keyboard over a period of ten years . . ." The report also relates Dr. McKenzie's opinion as to whether the injury was job-related:

> The injuries occurred from repetitive use/cumulative trauma over a period of ten years while employed by Central and Southwest [sic] Service as a computer program analyst/consultant. The history as presented by the claimant regarding causation of the injuries appears plausible, and in my opinion, the injuries are job-related.

Additionally, Dr. McKenzie states his opinion as to Cooper's ability to return to such work: "I do not believe Mrs. Cooper can return to any type of job requiring repetitive use of her hands."

37. On May 28, 1999, Cooper submitted to the EEOC a completed mail-in information sheet.[3] Attached to same were typewritten notes by Cooper. On the last page, Cooper states that her condition was due to "repetitive keyboarding at work."

38. On June 9, 1999, the EEOC sent to CSWS a Notice of Charge of Discrimination that does not identify the party making the charge or substance of the charge. The Notice states that no action is required of CSWS.

39. On June 29, 1999, Cooper perfected a charge of discrimination against CSWS based upon the alleged disability.

40. Also on June 29, 1999, Rhonda M. Blackstock, Vocational Rehabilitation Consultant, prepared a report on Cooper. As a result of the interview with Cooper, the report reads:

> The client reports sustaining an injury to both wrists in December of 1996 while working as an HR Systems Analyst for Central & Southwest [sic] Services. She described the injury as happening as the result of repetitive use of both hands.

Ms. Blackstock further opined: "Ms. Cooper's work capabilities profile is such that she will not be able to return to the job at which she was injured."

41. On July 7, 1999, the EEOC issued its Dismissal and Notice of Rights which concluded: "Your charge was not timely filed with the Commission, i.e., you waited too long after the date(s) of discrimination you alleged to file your charge."

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[3]Counsel for Cooper asserts that on March 2, 1999, Cooper submitted a letter to the EEOC advising that she had previously attempted to file a claim with a local intake officer but that her claim had been overlooked, that the 180 day period had passed and that she had been referred to the EEOC. There is nothing to substantiate this unsigned, unsponsored exhibit. Further, the exhibit does not state when Cooper allegedly submitted the overlooked complaint.

Argument and Authority

The Court first addresses Cooper's ADA claims. CSWS asserts the ADA claims were not timely filed and are time barred. Cooper makes two claims under the ADA. Cooper's first claim is based on working conditions. CSWS asserts this is barred. Cooper does not respond to this claim and it appears this issue is confessed. Nevertheless, the Court reviews the issue on the merits and concludes CSWS's position is well taken.

There is nothing in the record to establish the last day Cooper was actually on the job. However, the letter of December 30, 1997 from Ms. Wilson, Cooper's supervisor, clearly directs Cooper not to return to the workplace as of that date. Cooper's last work day necessarily occurred before the letter.[4] Giving Cooper the maximum time calculation possible, any claims she had based upon working conditions would have been required to have been filed no later than November 3, 1998. There is no evidence to support any filing took place.

As to Cooper's claims brought under the ADA based upon her discharge, Cooper conceded in her deposition testimony and also stated in her sworn Charge of Discrimination submitted to the EEOC on or about June 22, 1999, that she was fired on June 12, 1998.[5] She

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[4]Cooper was on vacation at the time.

[5]Cooper was advised in a March 20, 1998 letter that her employment with CSWS would terminate at the end of the 12 week period of her designated leave time subject to certain conditions remaining unfulfilled. The letter advised that June 12, 1998 was the expiration date for the leave. While the record does not establish Cooper was informed again on June 12 that her employment was terminated, it does establish that Cooper requested and received a letter from the company confirming her status, which letter was dated July 8, 1998. In support of her position that her claim was timely filed, Cooper appears to calculate the time within which to file her claim from July 8, the date of the letter. Based upon Cooper's acquiescence in the date of termination as June 12, 1998, her advance notice that June 12 would be the termination date and her knowledge that she had not met any of the necessary conditions to remain employed beyond that date, it is this date from which time for filing with the EEOC is measured.

would have therefore been required to file her Charge of Discrimination with the EEOC no later than April 8, 1999 in order to comply with the 300 day filing limitation period.[6]

Cooper submits an unsubstantiated, unsigned and self serving letter dated March 2, 1999 to the EEOC from Cooper which states she had submitted a prior claim to the Oklahoma Human Rights Commission but that it had been "overlooked." Cooper appears to argue that because March 2, 1999 was within the 300 day filing period, the May 28, 1999 Information Sheet and the subsequent June 22, 1999 Charge of Discrimination relate back to that date. However, as the March 2 letter does not constitute admissible evidence as submitted, it may not be considered by the Court.[7] The earliest admissible evidence submitted regarding Cooper's submission to the any agency, in this case the EEOC, is the Information Sheet dated May 28, 1999, well over a month out of time.[8]

Exhaustion of administrative prerequisites is jurisdictional in the Tenth Circuit. *Welsh v. City of Shawnee*,182 F.3d 934 (10th Cir. 1999).

> Exhaustion of administrative remedies is a jurisdictional prerequisite to bringing suit under Title VII. . . .. *Requiring a plaintiff to have first presented her claims in her EEOC charge before being allowed to bring suit serves the dual purpose of ensuring the EEOC has the opportunity to investigate and*

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[6]CSWS calculates the date as April 6. The Court however, finds the correct date is April 8.

[7]The letter also contains no EEOC stamp indicating it was received or that it is a copy of a document filed with the EEOC as do the other documents which Cooper submits in support of her timely filing. Unlike the missing intake document addressed by the Tenth Circuit in the unpublished opinion cited by both parties herein, *Welsh v. City of Shawnee*, 182 F.3d 934 (10th Cir. 1999), Cooper's initial submission to the Oklahoma Human Rights Commission apparently remains lost.

[8]As of March 2, Cooper still had a little over a month to timely file her charge. The unsigned letter purportedly from Cooper does not say when prior to March 2, 1999 Cooper alleges she submitted her claim to the Oklahoma Human Rights Commission.

conciliate the claims and of providing notice to the charged party of the claims against it. . . .(emphasis added).

In this case, CSWS was unaware of the claim until it received the letter of dismissal from the EEOC. It had no opportunity to participate in an investigation or to conciliate the claim, primary purposes of the proceedings.

Because the Court concludes that Cooper did not timely file her charge as required by 42 U.S.C. § 2000e-5(b) and the regulations promulgated thereunder, the Court need not address the merits of Cooper's ADA claim and CSWS is entitled to summary judgment on Cooper's ADA claims.

CSWS next urges summary judgment is appropriate on Cooper's claim for wrongful termination in violation of the public policy of the State of Oklahoma against handicap discrimination. Cooper has failed to address the legal arguments made and they are technically confessed. Nevertheless, the Court has reviewed the substantive law of the state of Oklahoma and finds summary judgment should be granted based upon the Oklahoma Supreme Court's discussion in *Collier v. Insignia Commercial Group*, 981 P.2d 321 (Okla. 1999), in which the court distinguishes its extension of a *Burk* public policy tort cause of action to cover claims for wrongful termination arising out of quid pro quo sexual harassment from the same claims brought for handicap discrimination.

The court found that although Oklahoma's Anti-Discrimination Act condemns quid pro quo sexual harassment as included in the litany of prohibited discriminatory classifications set forth in the Act, it provides adequate civil remedies only to those suffering from discriminatory housing practices and handicap discrimination. The court concluded that allowing a *Burk* tort

cause of action to members of the protected group who suffer discrimination other than via housing practices or based upon a handicap would remove the "asymmetrical remedies" which otherwise result. Based upon this discussion, this Court concludes that the Oklahoma courts will not allow a *Burk* tort cause of action to be brought for handicap discrimination and Cooper's claims brought thereunder must fail.

CSWS's final assertion is that Cooper's claim for retaliatory discharge in violation of Oklahoma's Worker's Compensation Scheme fails as a matter of law.[9] Cooper does not directly address the propositions raised by CSWS, but apparently relies upon the standard of review which weighs in her favor. Cooper submits the affidavits of a fellow employee and herself to minimize the time requirements of actively performing keyboarding on the computer and to show she was capable of returning to her job. These affidavits do not however establish that she was fired in retaliation for filing a workers' compensation claim, a necessary element to Cooper's *prima facie* case.[10]

To establish a *prima facie* case of retaliatory discharge, Cooper must prove the following four elements: (1) employment; (2) on-the-job injury; (3) medical treatment which put the employer on notice that treatment had been rendered for a work-related injury; and (4) consequent termination. *Buckner v. General Motors Corp.*, 760 P.2d 803, 806 (Okla. 1988).

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[9] 85 O.S. §5 (A)(2), provides: "No . . . corporation may discharge an employee during a period of temporary total disability solely on the basis of absence from work."

§5.B. provides: "No employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties. The failure of an employer to rehire or retain any such employee shall in no manner be deemed a violation of this section."

[10]The affidavits are directed more to the issue of whether CSWS's articulated reason for the termination is pretextual. Cooper does not reach that inquiry absent first establishing her prima facie case.

For purposes of the summary judgment motion, CSWS concedes the first three elements.

The most recent pronouncement by this circuit of what constitutes the fourth element of consequent termination is found in *Huggard v. Golden Corral Corp.*, 173 F.3d 62 (10th Cir. 1999) in which the court states:

> "[P]laintiff must produce evidence sufficient to support a legal inference that the termination was 'significantly motivated' by retaliation for exercising her statutory rights."

The mere fact that Cooper's termination occurred after she had filed a workers' compensation claim is not dispositive of this issue. The Oklahoma Court of Appeals addressed proximity of firing to the filing of a workers' compensation claim in upholding the trial court's grant of summary judgment in *Taylor v. Cache Creek Nursing Centers*, 891 P.2d 607 (Okla. App. 1994). In that case, plaintiff had returned to work after a two week, physician ordered, leave of absence in July, 1990, one and one-half year after she had sustained the injury for which she filed for worker's compensation.[11] In deciding the issue of whether Cache had established that her termination was a consequence of having filed the workers' compensation claim, the court noted she had presented no evidence showing a pattern of termination of workers who filed claims, or that any pressure was brought to bear on workers directed at discouraging filing of claims. There were no allegations that the supervisor who fired her referenced her having made a claim. In short, the court found that plaintiff Cache was simply relying on her pleadings.

The *Cache* court also noted, in footnote 11, that the employer had given plaintiff time to

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[11]The July 1990 leave of absence was not the result of a work injury and plaintiff had returned to work for a significant period of time before the July 1990 reinjury, however her workers' compensation claim was ongoing at the time of the reinjury.

heal and that she had not been able to perform her job duties since the accident. While it appears from her return to work that Cache was no longer receiving TTD benefits, making the facts distinguishable from those before this Court, a different result is not necessarily reached had this been the case.

The Tenth Circuit, interpreting Oklahoma law in *Grimes v. Janesville*, 111 F.3d 140, 1997 WL 183547 (10th Cir.1997), a non-binding opinion, predicted that the Oklahoma Supreme Court would find, in cases involving employees who become temporarily totally disabled as a result of a work-related injury, that §5.B. of the Workers' Compensation Act would prohibit employers from terminating employees solely on their absence from work, only after the period of temporary total disability ends, the employee is either physically able to return to work, or the disability becomes permanent.

This Court applied this reasoning in granting summary judgment, affirmed on appeal, in the case of *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106 (10th Cir.1999). This Court found that even though Taylor remained on temporary total disability, at the time of his discharge, he had advised defendant he would never be able to return to his route driving job, and his physician subsequently confirmed this. Defendant was therefore not required to retain him as an employee indefinitely.

In the instant matter, Cooper had been given ample opportunity to heal as well as opportunities to apply for other positions which would not have required keyboarding. There is no evidence that her workers' compensation claim was ever discussed or referenced, or that there was any pattern of discouragement or retaliation for workers' filing claims. The medical records available to CSWS at the time of termination indicated that her physician suspected "her

symptoms would flare" if she attempted to return to her job without restrictions. The medical report of Dr. Watts dated January 7, 1998, six months before her termination, indicated she would not be able to return to unrestricted keyboarding and that he doubted she would be able to return to full, non-restricted duty.

The medical report of Dr. Watts, dated March 20, 1998, states Cooper "does not intend to seek full time employment at this time," and indicates an in depth discussion with Cooper regarding her options, including redirecting her "potential avenues of employment." It also states he would release her to report to work if she made a request but that Cooper never requested a release. Cooper's own testimony establishes she did not discuss possible accommodations with her physician in spite of the fact she had been asked by CSWS to suggest them. She relied instead upon the advise of counsel that she could keep her job so long as she was under a temporary disability. However, based upon the court's reasoning in *Grimes*, Cooper's continuation of TTD does not, in fact, provide an absolute right to continued employment. Significantly, the medical reports for Cooper following her termination confirmed CSWS's conclusion that she would never be able to return to her job.

The Court concludes that, even though Cooper was receiving TTD at the time of her termination, the facts of this case fall within an exception to the absolute prohibition seemingly afforded by the provisions of §5.B. of the Workers' Compensation Act. The fact that she was terminated while receiving TTD is insufficient to create the legal inference necessary for Cooper to prove that the termination was significantly motivated by retaliation for exercising her right to seek workers' compensation, particularly where no other evidence is presented. Cooper therefore cannot establish a *prima facie* case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment is granted.

DATED THIS 24th day of July, 2000.

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTERSTATE ELECTRONICS CORPORATION, a California corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 00-C-312-B(J)
WESTWOOD INTERNATIONAL, INC., a Nevada corporation, a/k/a WESTWOOD CORPORATION and MC II ELECTRIC COMPANY, INC., a Texas corporation, a/k/a MC II/KURZ AND ROOT a/k/a MC II,	)	
Defendants.	)	

ORDER

Before the Court are the motion to compel arbitration (Docket No. 7) and motion for more definite statement (Docket No. 9) filed by defendants Westwood International, Inc. ("Westwood") and MC II Electric Company, Inc. ("MCII"); the motion for summary judgment (Docket No. 8) filed by defendant Westwood; and Request to Allow Plaintiff to File its Second Amended Complaint (Docket No. 12) and Request to Stay Decision on Motion for Summary Judgment and Motion to Compel Arbitration Pending Discovery (Docket No. 20) filed by plaintiff Interstate Electronics Corporation ("IEC").

IEC brings claims of breach of contract, breach of implied covenant of good faith and fair dealing and fraudulent inducement/misrepresentation against defendants Westwood and MCII arising from the purchase of computer interface modules ("CIMs") from IEC. IEC makes the

following allegations. IEC entered into a subcontract with MCII, Purchase Order 000478-00 ("Purchase Order"), on or about May 6, 1997, whereby MCII ordered 4194 CIMs for $6,035,040 to perform on MCII's prime contract with the U.S. Army. According to the price adjustment clause in the Purchase Order, the price per unit of the CIMs was $1,440 per unit unless the number of units was reduced or the program did not continue into production through no fault of IEC, in which case the price would be $9,100 per unit. IEC delivered eight prototype units to MCII in August 1997. In 1998, Westwood acquired all of the outstanding stock of MCII and assumed the obligations set forth in the Purchase Order. Upon notification in January 1998 that Westwood/MCII might substantially reduce the quantity of CIMs ordered, IEC submitted a price quote pursuant to the price adjustment clause of the Purchase Order in the amount of $3,312,796 for 1380 units, with all remaining terms and conditions of the Purchase Order unchanged. In May 1998, after completion of negotiation and pending signature on the amended contract, IEC delivered to Westwood/MCII 42 first article units. In July 1998, IEC delivered seven spare units. However, the amended contract for 1380 units was never executed as Westwood/MCII notified IEC by letter dated March 1, 1999 that it decided to contract with another company for the CIMs due to the price increase. IEC further alleges defendants fraudulently induced IEC to submit a unit price increase for the alleged reason that defendants could use the increase to support defendants' request for additional funds under its prime contract with the U.S. Army when it actually intended to contract with another manufacturer.

Defendants move to compel arbitration of this dispute pursuant to Paragraph 12 of the Purchase Order which states:

Buyer and Seller agree to make a good faith attempt to settle any dispute arising

> under or related to this Order without resort to legal action. If such good faith efforts fail, the Buyer, at its option, may submit the dispute to mediation and/or binding arbitration in the State and County in which the Order was issued. The selection of an independent and neutral mediator shall be at the mutual agreement of the parties. Buyer reserves the right to abandon arbitration and pursue all available legal and equitable remedies in the event Seller does not comply with a demand for arbitration within sixty days of notice. The cost of mediation and arbitration, including the fees of the mediators or arbitrators shall be divided equally by the parties unless the award provides otherwise. Each party shall bear its own cost of preparing and presenting its case.
> Pending resolution of any dispute arising hereunder, Seller shall proceed diligently with the performance of this order in accordance with Buyer's direction concerning the subject matter of such dispute. Irrespective of the place of performance, this Order will be construed and interpreted according to the laws of the state from which Buyers order is issued without resort to said state's Conflicts of Law rules.

Purchase Order 000478-00, ¶12. Defendants argue the Federal Arbitration Act ("FAA") applies as the purchase and sale of parts for a government contract clearly involve interstate commerce and the Purchase Order calls for arbitration of disputes arising therefrom. Section 2 of the FAA states in pertinent part the following:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2. Section 3 further provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §3. Defendants assert the arbitration terms set forth in ¶12 of the Purchase Order applies to any dispute under or related to the Purchase Order and therefore the dispute herein should be submitted to arbitration.

IEC objects to arbitration based on the following: (1) pursuant to ¶12 of the Purchase Order, Texas law applies to the dispute; (2) the arbitration clause is voidable for lack of consideration, and under the doctrine of separability, the underlying contract is enforceable by this Court; and (3) defendants waived arbitration by filing a summary judgment motion and failing to make good faith efforts to settle the dispute. In addition, IEC requests the Court allow it to pursue discovery before ruling on defendants' motion to compel arbitration.

The Court need not reach the issue of whether the FAA, 9 U.S.C. §1 *et seq.*, or the Texas General Arbitration Act ("TGAA"), Tex.Civ.Prac. & Rem. Code §171.001 *et seq.*, applies to this dispute as the inquiry is the same. In determining whether to compel arbitration, the Court must decide two issues: (1) whether a valid, enforceable arbitration agreement exists, and if so (2) whether the claims fall within the scope of the agreement to arbitrate. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 257-58 (5th Cir. 1996)(FAA); *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 581 (Tex.App. 1999)(TGAA). If the answer to both questions is affirmative, the Court must compel arbitration.

Paragraph 12 of the Purchase Order expressly provides the Buyer "at its option, may submit the dispute [*i.e.*, "any dispute arising under or related to this Order"] to mediation and/or binding arbitration in the State and County in which the Order was issued." IEC does not contest that it agreed to arbitrate any dispute arising under or related to the Purchase Order. Nor does

IEC contest that its claims fall within the scope of the agreement to arbitrate.[1] Rather IEC argues MCII/Westwood waived its right to arbitrate IEC's claims against it by filing a summary judgment motion and failing to make good faith efforts to settle the dispute. The Court disagrees.

Like any other contract right, the right to arbitration can be waived. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489 (10th Cir. 1994). In determining whether a party has waived its right to arbitration, the Court examines the following factors:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.

Peterson v. Shearson/American Express, Inc., 849 F.2d 464, 467-68 (10th Cir. 1988).

Applying these factors, the Court concludes MCII/Westwood has not waived its right to arbitration of the claims herein. Not only has defendants' demand for arbitration been consistent, it has been prompt, and the Court finds no evidence of defendants' lack of good faith in attempting to resolve the dispute. As early as January of 2000, three months prior to the filing of this lawsuit, counsel for the parties met to discuss settlement of the dispute arising from the purchase and sale of the subject CIMs. In a letter dated January 25, 2000, defendants' counsel

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[1] The Court notes, however, all of IEC's claims are arbitrable as they arise under or are related to the Purchase Order(s). *See Meyer v. Dans un Jardin, S.A.*, 816 F.2d 533 (10th Cir. 1987)(fraud in inducement of entire contract containing arbitration clause to be referred to arbitration under FAA).

requested "that the parties consider mediation as a first step, followed by agreed arbitration, if necessary" if they could not agree to a settlement. Defendants' counsel specifically cited ¶12 of the Purchase Order as providing the framework for resolution of the dispute if settlement discussions were unsuccessful. Immediately after IEC filed the lawsuit, defendants' counsel again contacted IEC's counsel to request arbitration, but the request was refused. Based on IEC's refusal, defendants filed the subject motion to compel arbitration twenty-seven days after service of the Complaint and well before "the litigation machinery had been substantially invoked." Even at this juncture, a schedule has not yet been entered in this case and no discovery has taken place. As the Court finds no delay, there can be no prejudice to IEC. Finally, the fact that defendant Westwood filed a motion for summary judgment on the same date arguing it is not a proper party is not inconsistent with and does not thereby preclude defendants' motion to compel arbitration. [2]

IEC also argues the doctrine of separability allows the Court to enforce the contract when the arbitration clause is voidable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967). IEC contends ¶12 of the Purchase Order is voidable for lack of consideration in that it grants the Buyer a unilateral option to arbitrate and defendants did not make a good faith attempt to settle the dispute before electing their unilateral arbitration option. In support of this argument, IEC cites *Stevens/Leinweber/Sullens, Inc. v. Holm Dev. and Management, Inc.*, 795 P.2d 1308 (Ariz. App.1990).

In *Stevens*, the parties entered into a construction contract which contained an arbitration

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[2]Regarding factor (4), defendants did not file a counterclaim.

agreement which gave the defendant the unilateral option of submitting the dispute to arbitration or filing a lawsuit. *Id.* at 1310. The agreement also gave defendant the option of reconsidering its choice of dispute resolution until final judgment was rendered. *Id.* The Arizona Court of Appeals held that the arbitration agreement was unenforceable for lack of consideration because there was no mutual obligation to submit the dispute to arbitration. *Id.* at 1313. The appellate court reasoned that despite a strong public policy favoring arbitration, the subject arbitration agreement would not promote that public policy, as defendant could choose between arbitration and litigation and could change its mind until the issuance of a final judgment. *Id.*

Stevens is clearly distinguishable. The concern of the *Stevens* court was not that defendant had a unilateral option; rather, the concern was that defendant had the unilateral option to choose between litigation and arbitration which it could exercise at any point until final judgment. Here, the buyer only has the option to choose between two forms of alternative dispute resolution, mediation or arbitration. Once that choice is made, both the buyer and seller must mutually agree in the selection of a mediator/arbitrator and bear equally the costs of the mediation or arbitration. The only way the buyer can abandon arbitration and pursue litigation is if the seller refuses to comply with the demand for arbitration within sixty days. Both parties are therefore equally obligated to resolve any dispute by mediation or arbitration. The Court thus concludes ¶12 is not voidable for lack of consideration.

Further, as stated above, IEC has not established that defendants failed to make good faith efforts to settle the dispute prior to moving to compel. Indeed, it was IEC who took legal action after settlement discussions did not succeed, despite defendants' counsel's notice that ¶12 required mediation or arbitration of the dispute. However, even if defendants had not acted in

good faith to resolve the dispute, ¶12 is not void for lack of consideration. IEC's remedy, if any, would be a claim for breach of contract.

Accordingly, the Court finds ¶12 of the Purchase Order requires mediation or arbitration of the dispute herein and stays the matter pending mediation or arbitration.[3] (Docket No. 7). Having so concluded, the Court overrules IEC's request to stay decision on the motion to compel arbitration and on the motion for summary judgment (Docket No. 20). All pending issues in Westwood's motion for summary judgment (Docket No. 8), defendants' motion for more definite statement (Docket No. 9) and the IEC's Request to Allow Plaintiff to File its Second Amended Complaint (Docket No. 12) are to be addressed in the arbitration proceeding.

The parties having been ordered to arbitration and these proceedings have been stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation. If, within sixty (60) days of a final adjudication of the arbitration proceedings, the parties have not by an appropriate motion to reopen for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

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[3] Should the parties be unable to agree on the timely selection of a mediator or arbitrator, the Court, upon application by either party, will designate and appoint an arbitrator. 9 U.S.C. §5; *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1327-29 (9th Cir. 1987)(affirming district court's appointment of umpire when parties failed to utilize contractual procedure and there was a significant lapse of time due to parties' failure to mutually agree to selection of umpire).

IT IS SO ORDERED this 24th day of July, 2000.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

DAVID KAUFFMAN,

Plaintiff,

vs.

TULSA EQUIPMENT MANUFACTURING COMPANY and JOHNSON BROKERS AND ADMINISTRATORS, INC.,

Defendants.

Case No. 99-CV-594-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 25th day of July, 2000.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUL 25 2000

FILED
JUL 25 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDREW GRABOW,

Plaintiff,

vs.

WILLIAMS NATURAL GAS COMPANY,

Defendant.

No. 97-C-498-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 24 day of July, 2000.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHERYL TOLBERT,
SSN: 441-56-1440

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-637-J

JUDGMENT

This action has come before the Court for consideration, and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 25 day of July 2000.

Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHERYL TOLBERT,
SSN: 441-56-1440

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-637-J

ORDER

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying her disability insurance and supplemental security income benefits under Titles II and XVI of the Social Security Act. Using the Medical-Vocational Guidelines ("the Grids"), the Administrative Law Judge ("ALJ"), James D. Jordan, denied benefits at step five of the sequential evaluation process used by the Commissioner to evaluate disability claims. The Appeals Council found no basis for changing the ALJ's decision. Consequently, the ALJ's decision is the Commissioner's final decision in this case.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform sedentary work. Given her RFC, the ALJ determined that Plaintiff would not be able to perform her past relevant work as a nurse's aide, hotel maid or restaurant counter person. The ALJ then applied grid rule 201.21 which directed a finding of "not disabled."

On appeal, Plaintiff argues (1) that the ALJ's RFC determination is not supported by substantial evidence because (a) the ALJ ignored Plaintiff's mental impairments, (b) the ALJ failed to properly evaluate Plaintiff's credibility, and (c) the ALJ failed to consider the combined effect of Plaintiff's impairments; (2) the ALJ failed to evaluate whether Plaintiff's impairments meet or equal a listing; and (3) the ALJ failed to evaluate the medical evidence in separate time periods. The Court has meticulously reviewed the entire record and for the reasons discussed below the Court rejects Plaintiff's arguments and **AFFIRMS** the Commissioner's decision.

I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.[1/]

[1/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three,

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

I. INTRODUCTION

In July 1987 Plaintiff worked for a few weeks at Sherwood Manor, a nursing home. On July 10, 1987, Plaintiff was lifting a patient from his bed to a wheelchair, when she alleges that she felt something in her back pop. It is Plaintiff's primary contention that the pain from this July 10th injury prevents her from performing any substantial gainful activity.

The medical record is in relative agreement that there is no objective, medically verifiable, or physiological basis for Plaintiff's pain. The objective tests all show a normal cervical and lumbar spine with no disc narrowing or disease. There is, however, a significant disagreement in the medical record regarding the degree to which Plaintiff's pain is somatic[2/] in origin, and, if it is, the degree to which Plaintiff's somatic pain disorder reduces her residual functional capacity.

[2/] "A somatoform disorder exists when there are '[p]hysical symptoms for which there are no demonstrable organic findings or known physiological mechanisms.'" Tolbert v. Chater, No. 96-5120, 1997 WL 57091, at * 1, n.2 (10th Cir. Feb. 11, 1997) (a copy of which can be found in the record at page 453). "The disorder causes a claimant to exaggerate her physical problems in her mind beyond what the medical data indicate." Id. (citing Easter v. Bowen, 867 F.2d 1128, 1130 (8th Cir. 1989)). "Such a disorder may itself be disabling." Id.

After a review of the entire record, which will be discussed below, the Court finds that the ALJ was faced with conflicting evidence regarding Plaintiff's mental impairments. This conflicting evidence required the ALJ to strike a balance and choose, based on the record as a whole, which competing inferences he would draw from the record. The Court's review of the ALJ's choice in such a situation is, as it should be, very limited. The Court will not re-weigh the evidence or substitute its judgment for that of the ALJ. Glass, 43 F.3d at 1395. The Court will overrule the ALJ's choice of competing inferences only when the ALJ's choice finds no support in the record. Based on an analysis of the ALJ's opinion (*r.* at 377-382), the Court finds that the ALJ's conclusions find support in the record and are, therefore, supported by substantial evidence. See, e.g., Thompson v. Apfel, No. 99-7065, 2000 WL 136862 (10th Cir. Feb. 7, 2000); and Casey v. Chater, No. 95-5224, 1997 WL 346163 (10th Cir. June 24, 1997).

II. PROCEDURAL AND MEDICAL SUMMARY

Plaintiff was injured at Sherwood Manor on July 10, 1987. On that day, she went to the Oklahoma Osteopathic Hospital and was seen by Walter F. Kempe, D.O. Plaintiff complained of pain in her low back. Dr. Kempe diagnosed lumbar strain and prescribed conservative treatment measures to include bed rest, moist heat, muscle relaxers and pain medication. By September 1987, Plaintiff was reporting that her back was "much better" with a "little tenderness." *R.* at 239-45. Plaintiff did not see Dr. Kempe again after September 1987. Plaintiff did not seek treatment again for more than two years.

Plaintiff filed a workmen's compensation claim in connection with her on-the-job injury at Sherwood Manor. In connection with this claim, Plaintiff was examined by Michael D. Farrar, D.O., at the request of her lawyer, and she was examined by Sami R. Framjee, M.D., at the request of Sherwood Manor's lawyers. Plaintiff saw Dr. Framjee in October 1988 and July 1989. Plaintiff saw Dr. Farrar in May of 1989.

Dr. Framjee, examining Plaintiff for the defense in her workmen's compensation case, took x-rays which showed a normal cervical and lumbar spine. Dr. Framjee found no tenderness and no reflex muscle spasms. Dr. Framjee noted that Plaintiff laughed throughout the examination, but gave multiple unnecessary moans and groans on examination. It was Dr. Framjee's impression that Plaintiff exhibited a marked, slow gait with effort when being observed, but that she exhibited a normal gait when not being observed. Dr. Framjee found no evidence of any occupational injury, and that work would be therapeutic for Plaintiff. *R.* at 289-96.

Dr. Farrar, examining Plaintiff for the prosecution in her workmen's compensation case, found that Plaintiff was suffering from cervical and lumbar strain. Dr. Farrar found stiffness, muscle inflamation,[3/] muscle spasm, and a decreased range of motion in Plaintiff's cervical and lumbar spines. Dr. Farrar ultimately concluded, for workmen's compensation purposes, that Plaintiff was experiencing 14% permanent partial disability due to problems with her cervical spine, and 11% permanent partial disability due to problems with her lumbar spine. *R.* at 246-52.

[3/] Diagnosed by Dr. Farrar as "myofasciitis." See Taber's Cyclopedic Medical Dictionary p. 1264 (17th ed. 1993).

Plaintiff filed her application for social security disability benefits on October 3, 1989. In November and December 1989, two non-examining physicians (Dr. Beck and Dr. Woodcock respectively) reviewed Plaintiff's medical records and issued physical RFC assessments. These assessments are consistent with the ALJ's conclusion that Plaintiff can perform the full range of sedentary work. *R.* at 221-228 and 232-33.

After the filing of her application with the Social Security Administration, Plaintiff sought sporadic treatment. Plaintiff saw Dr. Farrar in November 1989, January 1990 and October 1990, and then did not see him again. At each visit, Plaintiff complained of persistent pain in her back. Dr. Farrar diagnosed chronic cervical and lumbar strain, and found muscle spasm, stiffness, inflamation, and decreased range of motion. *R.* at 299. Plaintiff also saw a Richard A. Felmlee, D.O., on January 30, 1990 and February 6, 1990. Dr. Felmlee found that Plaintiff's x-rays were normal. Dr. Felmlee found that Plaintiff was suffering from "[l]umbosacral strain with accompanying somatic dysfunctions." *R.* at 260. Dr. Felmlee prescribed conservative treatment such as hot packs, ultrasound treatments and pain medication. *R.* at 254-260.

In February 1990, Plaintiff was referred by the Social Security Administration to Galen Baldwin, M.D., for a consultative examination in connection with her disability claim. Dr. Galen's report is sparse on analysis, but he found that Plaintiff could stand and walk without difficulty, but had some difficulty bending and lifting. *R.* at 283-84. In June 1990 Plaintiff was also referred to Shashi Husain, M.D., for

an EMG. Dr. Husain found that Plaintiff was not suffering from any nerve damage (i.e., there was "no evidence of any acute radiculopathy or neuropathy"). *R.* at 271. In June 1990 Plaintiff was also referred to J.D. McGovern, M.D., for a second consultative examination. Upon examination, Dr. McGovern found no objective medical support for any of Plaintiff's subjective complaints. Dr. McGovern noted excessive moaning and groaning by Plaintiff, and found her to be generally uncooperative. Dr. McGovern also observed that despite her subjective complaints, Plaintiff was able to go down the stairs without difficulty. *R.* at 274-78.

Based on the medical record described above, and Plaintiff's testimony at a May 1990 hearing (*r.* at 84-155), the ALJ denied benefits on September 17, 1990. The ALJ determined that Plaintiff had the RFC for a limited range of sedentary work. The ALJ then denied benefits at step five of the sequential evaluation process by applying grid rule 201.24. *R.* at 72-78. In June of 1991, the Appeals Council vacated the ALJ's September 1990 decision and remanded the case. The Appeals Council found that the ALJ had not performed a correct credibility analysis regarding Plaintiff's subjective pain complaints. The Appeals Council also found that Plaintiff had certain nonexertional impairments (i.e., stooping, bending, crouching, crawling, etc.), and that the ALJ should have obtained testimony from a vocational expert regarding these nonexertional limitations. *R.* at 40-41.

Upon remand from the Appeals Council, the ALJ held a second hearing in December 1991 and received additional testimony from Plaintiff and a vocational expert. *R.* at 107-127. In February 1992, the ALJ issued his second decision, again

denying benefits. This time, the ALJ denied benefits at step four of the sequential evaluation process. The ALJ determined that Plaintiff had the RFC to perform medium work, and that Plaintiff could return to her past relevant work as a dish room and tray line supervisor at Hillcrest Medical Center. *R.* at 308-14. During this remand period, Plaintiff saw Dr. Felmlee, and his associates, on nine separate occasions from January 1992 to March 1992. The conclusions reached by the doctors at each of these examinations are all similar. They noted cervical and lumbar strain, muscle spasm, muscle inflamation, and decreased range of motion. As the examinations progressed, the doctors began to note "somatic dysfunction" as their impression. *R.* at 324-33. In October 1992, the Appeals Council again vacated the ALJ's February 1992 decision, and remanded the case to another ALJ. The Appeals Council found that the ALJ's decision did not provide sufficient analysis to support his conclusion that Plaintiff retained the RFC to perform medium work. Consequently, the Appeals Council also determined that the ALJ had not adequately presented Plaintiff's limitations to the vocational expert. *R.* at 316-17.

Upon remand from the Appeals Council, a new ALJ held a third hearing in December 1992 at which he received additional testimony from Plaintiff and the vocational expert. *R.* at 128-155. In January 1993, the ALJ ordered two consultive examinations of Plaintiff. A psychological examination was performed by John W. Hickman, Ph.D., on January 22, 1993 and a physical examination was performed by Michael Karathanos, M.D., on January 26, 1993. Dr. Hickman's "diagnostic impression" was that Plaintiff was suffering from "somatoform pain disorder." *R.* at

344. Dr. Hickman observed that Plaintiff's speech was hesitant and "rather dramatic, with her making sure everyone knew she was in great pain with many 'sighs and oh's', and holding her head with her hands." Id. at 345. Despite these histrionics, Dr. Hickman observed that Plaintiff's "body posture was relaxed rather than tense, with no abnormal movements." Id. Using the WAIS-R test, Dr. Hickman found Plaintiff had a full scale IQ of 66, and using Shipley, that Plaintiff had an estimated IQ of 81. Dr. Hickman believed these scores were indicative of mild mental retardation. Dr. Hickman administered the MMPI, and found that people with scores similar to Plaintiff's usually evidence significant depression, although Dr. Hickman did not diagnose depression. Dr. Hickman found that Plaintiff had limitations in her ability to do all work-related activities except her ability to understand and carry out simple job instructions, and her ability to maintain her personal appearance.[4/] *R.* at 344-51.

When Dr. Karathanos examined Plaintiff, he noted that Plaintiff had an "obvious embellishment of her complaints," and that she "walked in a very deliberate and slow way," and that she was "always moaning and groaning." *R.* at 352. Dr. Karathanos found that it was impossible for him to determine Plaintiff's true limitations because of Plaintiff's "embellishment of symptoms." Dr. Karathanos' impression was that Plaintiff had lumbosacral strain with significant somatic features. *R.* at 352-56.

The ALJ issued a third decision in May 1993 again denying benefits. The ALJ determined that Plaintiff retained the RFC to perform a limited range of sedentary

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[4/] Dr. Hickman's use of "fair" and "poor" on his assessment form is evidence of disability. See Cruse v. DHHS, 49 F.3d 614, 618 (10th Cir. 1995).

work. The ALJ denied benefits at step five of the sequential evaluation process, finding that there were a significant number of jobs in the national economy that Plaintiff could perform given her RFC (e.g., teacher's aide, telephone sales, dispatcher, bench assembly, cashier, and information clerk). *R.* at 17-29. In September 1994, the Appeals Council adopted the ALJ's decision. *R.* at 7-8. Plaintiff appealed the Commissioner's final decision to this Court, and this Court affirmed the Commissioner's decision in March 1996. *R.* at 441-451. Plaintiff appealed this Court's decision to the Tenth Circuit, and in February 1997 the court of appeals reversed, with directions that this case be remanded to the Commissioner. *R.* at 453-61.

During the federal court appeal process, Plaintiff saw a doctor one time for her back pain. She saw Paul Higbee, M.D., in November 1995. While discussing Plaintiff's social history with her, Dr. Higbee asked about the injury that resulted in her pain and Dr. Higbee found her response to be "a little frankly suspicious." *R.* at 481. Dr. Higbee noted that Plaintiff's gait upon examination was "kind of contorted looking." Id. Dr. Higbee diagnosed chronic lumbar strain and recommended that Plaintiff "resume working of some type." Id. at 482. Dr. Higbee further advised Plaintiff that he would not prescribe narcotic therapy for her back pain. Id.

The Tenth Circuit reversed the Commissioner's decision primarily because the ALJ, in the third May 1993 decision, did not address the evidence in the record, especially that from Dr. Hickman, which indicated that Plaintiff might be suffering from a somatic dysfunction. Specifically, the Tenth Circuit held that "[t]he ALJ's

findings made no reference to Dr. Hickman's diagnosis of somatoform pain disorder, and did not consider whether [Plaintiff's] exaggerated complaints were a manifestation of this disorder, affecting her perception of pain." *R.* at 457. The Tenth Circuit concluded "that the ALJ erred in rejecting Dr. Hickman's diagnosis of somatoform pain disorder without providing any explanation for doing so, and that this error infected his evaluation of [Plaintiff's] subjective complaints of pain and, therefore, his evaluation of her credibility." Id. at 459.

Upon remand from the Tenth Circuit, Plaintiff was referred back to Dr. Hickman, a psychologist, in February 1997 for a follow up consultative examination. Plaintiff was also referred to Thomas A. Goodman, M.D., a psychiatrist, in October 1997 for a consultative examination. Dr. Hickman's "diagnostic impression" after his second examination of Plaintiff was significantly different than his earlier diagnosis of "somatoform pain disorder." Upon examination the second time, Dr. Hickman's "diagnostic impression" was that Plaintiff suffered from a "depressive disorder in partial remission with somatization features," and "features of a histrionic personality disorder." *R.* at 473. Using the WAIS-R test, Dr. Hickman found that Plaintiff had a full scale IQ of 79, which was 13 points higher than his previous finding. Dr. Hickman opined that the improvement in mental functioning could be secondary to Plaintiff taking an anti-depressant. Dr. Hickman also administered the MMPI-2 and found that individuals with MMPI-2 scores similar to that of Plaintiff often evidence significant levels of depression, lowered activity levels, apathy, and helplessness. Dr. Hickman found that Plaintiff had moderate to no significant limitations in her ability

to do all work-related activities except her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms, which he founded to be markedly limited because of Plaintiff's "somatic focus and preoccupation." *R.* at 471-77.

Dr. Goodman, the psychiatrist, completely disagreed with Dr. Hickman, the psychologist, whose report he had reviewed. Dr. Goodman finds that Plaintiff is suffering from "no psychiatric disorder." *R.* at 486. Plaintiff denied to Dr. Goodman that she had any difficulties with crying, sadness or depression. Plaintiff also denied any difficulties with her concentration. Plaintiff did report that she becomes anxious when under stress. After his examination, Dr. Goodman found that Plaintiff "presents no evidence of a current psychiatric disorder or impairment. Psychologically, I see no reason why she could not do the same level of work in which she has always done previously." Id. Consequently, Dr. Goodman found that Plaintiff had no significant limitations in her ability to do all work-related activities. *R.* at 485-492.

Between seeing Dr. Hickman in February 1997 and Dr. Goodman in October 1997, Plaintiff had gall stone surgery at Hillcrest Medical Center in March 1997. There is no mention in any of these medical records of Plaintiff's allegedly disabling back pain. There is no mention of Plaintiff moaning or groaning about her back pain. Plaintiff also reported that upon admission she was not taking any medications. *R.* at 498-577. None of the physicians report that Plaintiff was complaining of back pain, even though they were evaluating her for abdominal pain. The only indication in these records is that Plaintiff was "positive for previous back injury." *R.* at 528.

In May 1998, the ALJ held another hearing after the remand from the Tenth Circuit. The ALJ received testimony from the Plaintiff, a vocational expert, and Harold Goldman, M.D., a medical expert used by the ALJ to help him interpret the medical evidence. *R.* at 390-439. Dr. Goldman's testimony is far from clear. However, Dr. Goldman did express the following opinions regarding the medical record. Dr. Goldman opined that, based on the medical records before him, Plaintiff neither met or equaled a listing. Dr. Goldman opined that, based on the medical evidence, Plaintiff had no limitations on her physical RFC. Regarding Plaintiff's mental RFC, Dr. Goldman testified that he agreed more with Dr. Hickman's report than Dr. Goodman's report. *R.* at 429. Based on the record, Dr. Goldman testified that he agrees with Dr. Hickman that Plaintiff would have difficulty performing work in a sustained fashion due to her somatic dysfunction. *R.* at 430-31.

Based on all of the evidence summarized above, the ALJ issued a fourth decision in August 1998 denying benefits. *R.* at 374-88. The ALJ found that Plaintiff retained the RFC to perform sedentary work. Based on her age, education, work experience and RFC, the ALJ applied grid 201.21 and found Plaintiff to be not disabled. The Appeals Council adopted the ALJ's decision in June 1999. *R.* at 364-66. Plaintiff has appealed, and the ALJ's August 1998 and the Appeals Council's June 1999 decisions are now before the Court for review pursuant to 42 U.S.C. § 405(g).

III. ANALYSIS OF THE ALJ'S AUGUST 1998 DECISION

Cases such as this, where somatic dysfunction is the dominant theme, are problematic for ALJs. In somatoform cases, ALJ's are required to make incredibly delicate credibility assessments in order to choose between two equally possible scenarios: either the claimant is suffering from a legitimate mental impairment, or the claimant is suffering from physical symptoms which are consciously being exaggerated in an effort to acquire disability benefits. In this case, the ALJ considered the entire record and determined that this Plaintiff was consciously exaggerating her symptoms. Plaintiff, of course, objects to the ALJ's conclusion. Plaintiff cannot, however persuasively demonstrate, considering the disputed record summarized above, that there is not substantial evidence (i.e., more than a scintilla) to support the ALJ's ultimate conclusion. The Court must, therefore, without re-weighing the evidence itself, affirm the Commissioner's decision.

Plaintiff's first allegation of error is that the ALJ ignored Dr. Hickman's reports and instead relied on Dr. Goodman's report. See Doc. No. 7, pp. 2-3. The Court does not agree. In fact, the ALJ specifically addresses Dr. Hickman's reports, including the difference between the first and second report. The ALJ also discusses Dr. Hickman's reports in light of all of the other evidence in the record. *R.* at 379-81. The ALJ also does not rely exclusively on Dr. Goodman's report as suggested by Plaintiff. In fact, the ALJ concludes that the balance is somewhere between Dr. Hickman's reports and Dr. Goodman's report. *R.* at 381. Having struck this balance, the ALJ concluded that Plaintiff's mental impairments were not severe enough to

significantly limit her ability to perform work-related functions. Id. Plaintiff has offered no specific argument as to why the balance struck by the ALJ is improper, or why the reasons the ALJ gave for the balance he struck are not supported by the record.

Plaintiff's second allegation of error is that the ALJ failed to consider the effect of Plaintiff's depression on her IQ. See Doc. No. 7, pp. 3-4. The Court does not agree. The ALJ specifically found that Plaintiff "may be subject to a degree of depression." *R.* at 380. The ALJ then accepted the statement in Dr. Hickman's second report that the increase in Plaintiff's IQ scores could have been caused by the fact that she was now taking a mild antidepressant. Id. The ALJ then concluded that the more recent IQ results were "a more accurate assessment of [Plaintiff's] ability when following prescribed treatment." *R.* at 380-81. Plaintiff has offered no reason why it is improper for an ALJ to consider only those limitations which remain after prescribed treatment has been followed. See, e.g., Pacheco v. Sullivan, 931 F.2d 695, 698 (10th Cir. 1991); and 20 C.F.R. § 404.1530.

Plaintiff's third allegation of error is that the ALJ failed to perform a proper analysis at step three of the sequential evaluation process. See Doc. No. 7, p. 4. Plaintiff argues that absolutely no analysis was made of listing 12.05C regarding mental retardation and listing 12.07 regarding somatoform disorders. The Court disagrees. On the second page of his opinion, the ALJ discussed step three's requirements and found that Plaintiff did not have an impairment that met or equaled any listing. *R.* at 375. The ALJ stated that the remaining discussion in his decision

would lay a foundation for his step three conclusion. Plaintiff has offered no authority which suggests that the ALJ's step three analysis must all occur in the same paragraph of his opinion. Thus, as long as the ALJ's analysis as a whole supports his step three conclusion, his decision must be affirmed.

To meet listing 12.05C, Plaintiff's IQ scores must be between 60 and 70. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, listing 12.05C. For the reasons discussed above, the ALJ properly chose to rely on Dr. Hickman's second IQ results, which showed Plaintiff has a verbal IQ of 78, a performance IQ of 81, and a full scale IQ of 79. Plaintiff has failed, therefore, to demonstrate that she meets listing 12.05C.

As discussed above, the ALJ concluded that Plaintiff is not suffering from a legitimate somatoform disorder. Thus, the ALJ could not have erred in concluding that Plaintiff does not meet listing 12.07 which is the listing for somatoform disorders. In any event, Part B of listing 12.07 requires that three out of the four criteria be present in order for the listing to be met. The ALJ specifically discusses the Part B criteria of listing 12.07 in his decision, and finds none of the criteria to be met. *R.* at 381. This finding is consistent with the ALJ's resolution of the conflict between Dr. Hickman's and Dr. Goodman's reports.[5/] There is, therefore, no merit to Plaintiff's argument that the ALJ failed to analyze the applicable listings.

[5/] Even Dr. Hickman's second report is consistent with the ALJ's listing conclusion. Dr. Hickman's most current report would at most compel a finding that only one out of the four Part B criteria in listing 12.07 is met (i.e., repeated episodes of deterioration or decompensation in work or work-like settings). See *R.* at 474-77; and Testimony of Dr. Goldman at the May 1998 hearing, *R.* at 429.

Plaintiff's fourth allegation of error is that the ALJ failed to consider whether Plaintiff was disabled for a closed period between 1993 and 1997. See Doc. No. 7, pp. 4-5. Plaintiff argues that Dr. Hickman's first report in 1993 establishes that she met listing 12.05C, and Dr. Hickman's report in 1997 shows that she improved to the point where she no longer met the listing. Plaintiff argues, therefore, that the ALJ should have awarded benefits from 1993 until the point at which this improvement occurred. The Court finds no merit in Plaintiff's argument. The ALJ adequately discussed the differences between Dr. Hickman's 1993[6/] and 1997 test results, and determined that the 1993 test results were not a reliable assessment of Plaintiff's IQ due to several factors which are outlined in the ALJ's opinion. *R.* at 379-81.

Plaintiff's fifth allegation of error is that the ALJ "ignored the diagnosis of somatoform disorder in assessing [Plaintiff's] credibility." See Doc. No. 7, p. 5. Relying on the Tenth Circuit's previous order, Plaintiff makes something in the nature of a *res judicata* or law of the case argument. Plaintiff seems to argue that the Tenth Circuit held that Plaintiff was suffering from a somatoform disorder, and ordered the ALJ on remand to assess Plaintiff's credibility in light of this disorder. However, the Tenth Circuit did not specifically find that Plaintiff was suffering from a somatoform disorder. Rather, the court of appeals simply remanded because the ALJ had not even discussed Dr. Hickman's 1993 somatoform diagnosis. The court of appeals did not require the ALJ to accept or reject Dr. Hickman's 1993 diagnosis on remand. The

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[6/] Dr. Hickman's first report also contained widely varying IQ scores. The WAIS scores ranged from 66-68, which would meet Part A of listing 12.05C, but the Shipley score of 81 would not meet the listing.

court of appeals simply required the ALJ to specifically address the diagnosis, and either accept it or give specific, legitimate reasons for rejecting it. In his most current decision, the ALJ spends many paragraphs discussing Dr. Hickman's 1993 diagnosis and giving reasons for his rejection of the diagnosis.[7/] The Court finds, therefore, that the ALJ has complied with the Tenth Circuit's earlier mandate.

CONCLUSION

For the reasons discussed above, the Court finds that the ALJ's decision to deny benefits in this case is supported by substantial evidence. Consequently, the Court **AFFIRMS** the Commissioner's decision to deny benefits in this case.

IT IS SO ORDERED.

Dated this 26 day of July, 2000.

Sam A. Joyner
United States Magistrate Judge

[7/] Plaintiff also argues that the ALJ mischaracterized Plaintiff's mental impairment as mere "features" of somatization. Even if this were true, there is no indication in the ALJ's opinion that he gave dispositive weight to this "characterization" of Plaintiff's impairment. In relaity, the ALJ was simply stating what Dr. Hickman himself stated in his most recent report: "depressive disorder in partial remission with somatization features." *R.* at 473.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PETROLEO BRASILEIRO S.A., PETROBRAS, organized under the Federive Republic of Brazil,	)	
Plaintiff,	)	
vs.	)	**Case No. 99-CV0736K (J)**
MID-CONTINENT HEATERS, INC., an Oklahoma corporation,	)	
Defendant.	)	

STIPULATED JUDGMENT

Before the court is the Motion for Entry of Stipulated Judgment. On the 26th day of May, 2000 the Court held a status conference in the above referenced matter. The Plaintiff, Petroleo Brasileiro S.A., Petrobras ("Petrobras") appeared by counsel, Jackson M. Zanerhaft and the Defendant Mid-Continent Heaters, Inc. ("Mid-Continent") by counsel, Donald E. O'Dell. At the conference, the Defendant announced that it would agree to Entry of Judgment against it pursuant to the prayer asked by Plaintiff in its complaints. Accordingly,

THE COURT HEREBY FINDS AND CONCLUDES THAT:

1. Petrobras is a citizen of the country of Brazil with its principal place of business in Rio de Janeiro, Brazil. Mid-Continent is a corporation organized and existing under the laws of the State of Oklahoma. This Court has jurisdiction under 28 U.S.C. § 1332(a) and venue is appropriate under 28 U.S.C § 1391(a).

2. On or about November 17, 1998, Petrobras and Mid-Continent entered into an Agreement whereby Mid-Continent agreed to sell pre-manufactured pipe spools for the turnkey price U.S. $1,111,855.00.

3. On December 2, 1998, as required under the Agreement, Petrobras made a down payment of U.S. $667,113.00.

4. Mid-Continent has wholly failed to comply with the terms of the Agreement and has failed to deliver the pipe spools as required by the time schedule provided in the Agreement because of this and other defaults, Mid-Continent breached the Agreement and had refused and failed to cure said default.

5. Because of the aforementioned default Petrobras has sustained damages in the sum of U.S. $667,113.00 for which Plaintiff is entitled to judgment against Mid-Continent plus interest, costs and attorney fees.

THEREFORE, THE COURT HEREBY ORDERS THAT:

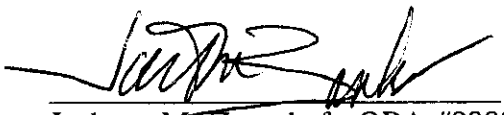
1. The Motion to Enter the Stipulated Judgment is granted.

2. Judgment is hereby granted in favor of the Plaintiff in the sum $667,113.00 plus interest as allowed under applicable law.

3. Plaintiff is hereby granted reasonable attorney fees in the sum of $75,000.00, plus costs in the sum of $ 514.00.

SAM JOYNER
UNITED STATES MAGISTRATE JUDGE
NORTHERN DISTRICT OF OKLAHOMA

APPROVED BY:



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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY WILSON,
SSN: 452-13-1757

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-478-J

JUDGMENT

This action has come before the Court for consideration, and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 25 day of July 2000.

Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY WILSON,
SSN: 452-13-1757

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-478-J

ORDER

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying him disability insurance and supplemental security income benefits under Titles II and XVI of the Social Security Act. The Administrative Law Judge ("ALJ"), R.J. Payne, denied benefits at steps four and five of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform a limited range of light work. Given his RFC, the ALJ determined that Plaintiff could perform his past job as a security guard. The ALJ also alternatively determined that, given his RFC, Plaintiff could perform a substantial number of other jobs in the national economy. On appeal, Plaintiff argues (1) that the ALJ failed to perform a step four analysis in accordance with Tenth Circuit precedent, and (2) that the RFC used by the ALJ at step five is not supported by substantial evidence. The Court has meticulously reviewed the entire record and, for the reasons

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discussed below, the Court rejects Plaintiff's arguments and **AFFIRMS** the Commissioner's decision.

I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.[1/]

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the

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[1/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. DISCUSSION

A. First Alleged Error – The ALJ Failed to Conduct a Proper Step Four Analysis.

The Court agrees that the ALJ's step four analysis does not comply with the requirements established by the Tenth Circuit in Winfrey v. Chater, 92 F.3d 1017 (10th Cir. 1996). Winfrey established a three part inquiry for step four determinations. At step four, an ALJ is required to assess the claimant's RFC, determine the physical and mental demands of the claimant's past relevant work, and then determine whether the claimant has the ability to meet the demands of his past work in light of his current RFC. The ALJ must make specific findings on the record regarding each part of his step four analysis.

In Winfrey, the Tenth Circuit specifically held that an ALJ may not simply describe the claimant's limitations to a vocational expert and ask the vocational expert's opinion as to whether the claimant can perform his past relevant work. "When . . . the ALJ makes findings only about the claimant's limitations, and the remainder of the step four assessment takes place in the VE's head, we are left with nothing to review." Winfrey, 92 F.3d at 1025. "Therefore, while the ALJ may rely on information supplied by the VE at step four, the ALJ himself must make the required findings on the record, including his own evaluation of the claimant's ability to perform his past relevant work." Id.

In this case, the ALJ made no specific findings on the record for any part of the step four analysis. See *R.* at 18. Rather, the ALJ does exactly what Winfrey

prohibits. He presents the vocational expert with Plaintiff's limitations and then simply asks the vocational expert if Plaintiff can perform his past relevant work. See *R.* at 256-261. The Court finds, therefore, that the ALJ's step four analysis does not comply with Winfrey's requirements.

The ALJ went on and made an alternative step five determination, which he is specifically authorized to do by Murrell v. DHHS, 43 F.3d 1388, 1389 (10th Cir. 1994). Thus, as long as the ALJ's step five determination is sound, the Commissioner's decision may still be affirmed.

B. SECOND ALLEGED ERROR – THE ALJ'S RFC DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Plaintiff argues that the ALJ's "RFC does not include significant limitations that are demonstrated by the record." Doc. No. 9, p. 4. According to Plaintiff, a "very significant impairment omitted from the RFC was the side effects of medication." Id. at 5. As sole support for this allegation, Plaintiff cites to his own testimony at page 251 of the record.

Plaintiff testified as follows:

Q Do you have any side effects from the medications you take?

A No, sir. Except being drowsy at times.

Q Which one makes you drowsy?

A They [sic] Hydrocodone.

Q Do you take it every day?

A Yes, sir. Four times a day.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

REVEREND MELVIN E. EASILEY, *et al.*,

Plaintiffs,

vs.

NORRIS, a Dover Resources Company,

Defendant.

Case No. 99-CV-196-K(J)

REPORT AND RECOMMENDATION

Now before the Court is "Defendant's Application for Attorney's Fees and Costs." [Doc. No. 147]. Defendant's motion has been referred to the undersigned for disposition pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72. Pursuant to Fed. R. Civ. P. 54(d)(2)(D), Defendant's motion for attorney fees is to be treated, for purposes of a referral to a magistrate judge, as a dispositive motion under Rule 72(b). Accordingly, the undersigned issues this Report and Recommendation, as opposed to an Order. Having reviewed the entire record, and for the reasons discussed below, the undersigned recommends that Defendant's motion for attorney fees be **DENIED**.

I. COSTS

With its motion, Defendant seeks to recover the costs and the attorney fees it spent to defend this lawsuit. The cost issue has already been resolved pursuant to the procedure established by N.D. LR 54.1. Defendant submitted a Bill of Costs on

May 8, 2000, and Plaintiffs filed objections to Defendant's Bill of Costs. See Doc. No. 150. Pursuant to local rule 54.1, Defendant's Bill of Costs and Plaintiffs' objections were set for hearing before the Court Clerk. The Clerk heard argument and ultimately taxed costs in Defendant's favor in the amount of $8,192.11. See Doc. No. 154.

Pursuant to local rule 54.1(E) and Fed. R. Civ. P. 54(d)(1), a party may seek judicial review of the Clerk's cost determination by filing a motion for review within five days of the date costs were taxed by the Clerk. The Clerk taxed costs on June 6, 2000. Consequently, a motion for review was due on or before June 19, 2000. No motion for review has been filed by any party. The Clerk's determination of the cost issue, pursuant to 28 U.S.C. §§ 1920, 1924 and Fed. R. Civ. P. 54(d)(1), is therefore final. The undersigned will not revisit the cost issue in this Report and Recommendation. The undersigned will only address whether Defendants are also entitled to recover their attorney fees as the prevailing party in this litigation.

II. DISCUSSION

Fed. R. Civ. P. 55(d)(2) governs awards of attorney fees in federal courts. Rule 54(d)(2)(A) requires that claims for attorney fees be made by motion "unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial." Defendant was not seeking damages at trial. Consequently, Defendant could not have been required to prove its attorney

fees as an element of damages. Defendant has, therefore, properly sought its attorney fees with a timely[1/] motion.

Rule 54(d)(2)(B) requires that a motion for attorney fees specify the statute, rule, or other grounds entitling the moving party to the award [of fees]." Defendant alleges that it is entitled to fees pursuant to 42 U.S.C. §§ 1988(b) and 2000e-5(k). Defendant also alleges that the Court possesses inherent authority to award fees under the facts of this case.

A. NATURE OF PLAINTIFFS' CLAIMS

The Court must examine each claim that was being asserted by Plaintiffs to determine whether Defendant is a prevailing party entitled to its attorney fees on each claim. The undersigned will, therefore, summarize the complaints filed in this case.

Plaintiffs filed their original Complaint in this case on March 12, 1999. [Doc. No. 1]. The Complaint invoked the jurisdiction of the Court under Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution. The Complaint alleged that Reverend Melvin Easiley, one of the plaintiffs in this case, is a long-time employment activist for the NAACP, and that he initiated and organized an effort by a number of Defendant's employees to file discrimination charges with the EEOC and to file a class action Title VII discrimination case against Defendant. The Compliant also alleges that Defendant, in retaliation against Rev. Easiley for his

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[1/] A motion for attorney fees must be filed within 14 days after the entry of judgment. See Rule 54(d)(2)(B), and N.D. LR 54.2. Judgment was entered in this case on April 24, 2000. [Doc. No. 146]. Defendant's motion for fees was filed on May 8, 2000. [Doc. No. 147]. Defendant's motion was, therefore, timely and Plaintiff does not argue otherwise.

activities with Defendant's employees, filed a lawsuit against Rev. Easiley in Tulsa County, Oklahoma. A copy of Defendant's state court Petition is attached to the original Complaint as Exhibit "A."

In its state court Petition against Rev. Easiley, Defendant alleged that it had a collective bargaining agreement between itself and the United Steel-Workers of America, an affiliate of the AFL-CIO-CLC ("the Union"). Defendant alleged that, pursuant to this collective bargaining agreement, it recognized the Union as the exclusive bargaining agent for its hourly employees. Defendant further alleged that, by claiming to represent Defendant's employees, Rev. Easiley was interfering with Defendant's collective bargaining agreement with the Union. In particular, Defendant alleged that Rev. Easiley was interfering with its right to deal exclusively with the Union concerning complaints made by employees about terms and conditions of employment with Defendant. Defendant also alleged that Rev. Easiley injured its business and reputation by recklessly making false statements and accusations to third parties (i.e., former employees, vendors, suppliers and various governmental agencies) about Defendant's business and employment practices. Based on these allegations, Defendant asserted the following claims against Rev. Easiley in the state court action: (1) Defendant alleged that Rev. Easily was liable for tortiously interfering with the contractual and business relationship Defendant had with the Union, one or more of its vendors, and one or more of the governmental agencies which regulates Defendant's business; and (2) Defendant alleged that Rev. Easily was liable to

Defendant for slander *per se* due to the allegedly false and misleading statements Rev. Easily had made to various third parties.

In their original Complaint filed in this case, Plaintiffs alleged that Defendant's filing of the state court action was an unlawful retaliation against Rev. Easiley and the other Plaintiffs - employees of Defendant who Rev. Easiley assisted in filing various claims against Defendant. Plaintiffs allege that Defendant's filing of the state court action against Rev. Easiley was an unlawful infringement on the exercise of their rights under Title VII. Plaintiffs alleged further that Defendant was engaged in harassing discovery in the state court case which was also infringing on Plaintiffs' statutory and constitutional rights. The only relief sought by Plaintiffs in the original Complaint was an injunction prohibiting Defendant from continuing with its state court action against Rev. Easiley. On March 17, 1999, the Court entered its order denying Plaintiffs' request for injunctive relief and declining to enjoin Defendant's prosecution of the state court action against Rev. Easiley. See Doc. No. 7.

Having denied Plaintiffs' request for injunctive relief, the Court found that if Plaintiffs intended to assert claims for affirmative relief, they would be required to file an amended complaint. [Doc. No. 17]. Plaintiffs filed their First Amended Complaint on July 7, 1999. [Doc. No. 18]. This amended complaint contains allegations which are virtually identical to the original complaint. In addition to Title VII and the Fourteenth Amendment, the amended complaint also invokes the jurisdiction of the Court under the First Amendment to the United States Constitution. The amended complaint also asserts the following two claims for affirmative relief against

Defendant: (1) Plaintiffs allege that Defendant's state court action infringes on their First Amendment rights;[2/] and (2) Plaintiffs allege that because Defendant's state court action was motivated by retaliatory intent, it infringes on their rights under Title VII.

Despite the vague nature of their various claims, it appears that Plaintiffs were attempting to state a claim under Title VII of the Civil Rights Act of 1964 and claims for violation of their First Amendment rights under the United States Constitution. Pursuant to the American Rule, absent a statute or enforceable contract, a prevailing litigant is ordinarily not entitled to recover attorney fees from the loser. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). There is no evidence of a contract in this case governing the payment of attorney fees. The Court must, therefore, determine whether there is a statute that authorizes Defendant to recover attorney fees for the types of claims asserted by Plaintiffs.

[2/] Plaintiffs' First Amended Complaint is far from a model of clarity. In the section of the First Amended Complaint where Plaintiffs purport to assert a First Amendment claim, Plaintiffs assert that claim only on behalf of Rev. Easiley. That is, Plaintiffs allege only that the state court action violates Rev. Easiley's First Amendment right, presumably to communicate with Defendant's employees as an NAACP representative to assist those employees in redressing alleged violations of their civil rights. See Doc. No. 18, ¶¶ 29-32. However, reading the First Amended Complaint as a whole, it could be construed as asserting against Defendant a First Amendment claim on behalf of all Plaintiffs. Although not specifically pled, the undersigned presumes that Plaintiffs are alleging that Defendant's state court action infringed on their right to communicate with Rev. Easily and others about Defendant's conduct and in some manner infringed on their ability to petition the government for a redress of their grievances (e.g., the EEOC). The vagueness of Plaintiffs' First Amended Complaint is confirmed by the fact that they sought leave to file a second amended complaint in part to make it clear that they were seeking compensatory damages for Defendant's alleged First Amendment and Title VII violations. See Doc. No. 35. The Court denied leave to file the second amended complaint because the request was untimely. See Doc. No. 94.

B. ATTORNEY FEES MAY BE RECOVERABLE BY A PARTY PREVAILING ON EITHER A TITLE VII OR FIRST AMENDMENT CLAIM.

With Title VII of the Civil Rights Act of 1964, Congress authorized parties who are aggrieved by an unlawful employment practice, as defined in 42 U.S.C. §§ 2000e-2 and 2000e-3, to bring federal civil actions against those parties responsible for the unlawful employment practice. See 42 U.S.C. § 2000e-5(f)(1). Congress also provided for the recovery of attorney fees as follows:

> In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs.

42 U.S.C. § 2000e-5(k).

With the passage of the Ku Klux Klan Act of 1871, Congress authorized the bringing of federal civil actions by parties who are deprived of their constitutional rights under color of state law. See 42 U.S.C. §§ 1981-1986. This would include any alleged deprivation of rights secured by the First Amendment to the United States Constitution. See, e.g., Elam Construction, Inc. v. Regional Transportation District, 129 F.3d 1343 (10th Cir. 1997).

With the Civil Rights Attorney's Fees Awards Act of 1976, Congress provided for the recovery of attorney fees in civil rights cases as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of [title 42], . . . title VI of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000d *et seq.*), . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 1988(b).

Congress enacted § 1988(b) to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska . . . , and to achieve consistency in our civil rights laws." S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 2 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910. With § 1988(b), Congress authorized federal courts to provide reasonable attorney fees to prevailing parties in suits to enforce all of the civil rights acts which Congress has passed since 1866. Id. Congress specifically drew the language of § 1988(b) from preexisting fee provisions like those in Title VII (i.e., § 2000e-5(k)), and Congress intended that the standards for awarding fees under § 1988 be the same as those under the fee provisions of the 1964 Civil Rights Act. Thus, courts should interpret § 1988(b) and § 2000e-5(k) in tandem when they address the propriety of awarding attorney fees to a prevailing civil rights party. A unified set of standards should be developed and applied in all civil rights cases in which Congress has authorized an award of attorney fees. See Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983); and Hughes v. Rowe, 449 U.S. 5, 14 (1980).

C. STANDARDS FOR DETERMINING WHEN ATTORNEY FEES SHOULD BE AWARDED UNDER 42 U.S.C. §§ 1988(b) AND 2000e-5(k).

Congress has given federal trial courts the discretion to award a reasonable attorney fee to a prevailing party in a case arising under Title VII of the Civil Rights Act of 1964 and the First Amendment of the United States Constitution. See 42 U.S.C. §§ 1988(b) and 2000e-5(k). These statutory provisions are, however, not

self-executing. The statutes do not inform the judge as to what factors are relevant to the exercise of his discretion. Given the numerous ways in which litigation can come to an ultimate conclusion, the statutes also do not provide the judge with guidance about when a party should be considered a "prevailing" party. Congress left these difficult issues for judicial interpretation.

1. Standard Applicable to Prevailing Civil Rights Defendants

Neither § 1988(b) nor § 2000e-5(k) distinguish between prevailing civil rights plaintiffs and prevailing civil rights defendants. These statutes authorize the award of attorney fees to both prevailing plaintiffs and prevailing defendants, and they entrust the effectuation of the underlying statutory policy to the discretion of the courts. Exercising this discretion and balancing the equities in order to effectuate the underlying policies of the nation's civil rights laws, the Supreme Court has developed two distinct standards for prevailing civil rights plaintiffs and prevailing civil rights defendants.

Relying on Congress' intent to cast civil rights plaintiffs in the role of private attorneys general, and on the fact that attorney fee awards to prevailing plaintiffs are necessarily awarded against violators of federal law, the Supreme Court has held that a prevailing civil rights plaintiff should ordinarily recover his attorney fees unless special circumstances would render such an award unjust.[3/] Christianburg Garment

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[3/] The Supreme Court also found it extremely significant that one Congressional policy underlying all of the nation's civil rights laws was to encourage the vindication of core federal rights which might otherwise remain unenforced because of a plaintiff's lack of resources, often due to the loss of employment (continued...)

Co. v. EEOC, 434 U.S. 412, 416-18 (1978). The Supreme Court has determined that none of the policy considerations supporting the nearly-automatic award of attorney fees to prevailing plaintiffs applies to prevailing defendants. Consequently, more rigorous standards apply to fee awards to prevailing defendants than to prevailing plaintiffs in civil rights cases. The Supreme Court has held that "a district court may in its discretion award attorney fees to a prevailing defendant in a [civil rights case only] upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. at 421.[4/] "[N]eedless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." Id. at 422.[5/] The Supreme Court has found that this dichotomous standard strikes the appropriate balance between the dual policies of the Civil Rights Attorney's Fees Awards Act of 1976: To discourage the litigation of frivolous, unreasonable, groundless, or vexatious claims, but without discouraging the rigorous enforcement by private parties of the nation's civil rights laws.

[3/] (...continued)
caused by the derogation of the very federal right to be enforced, and the small size of the expected recovery. See S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 2-3 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910-11.

[4/] In determining whether this standard has been met, the Court must assess Plaintiffs' claims at the time they were filed. The Court must avoid the post-hoc reasoning that, because the plaintiff did not ultimately prevail, the claim must have been frivolous, unreasonable or without foundation. Christianburg, 434 U.S. at 421-22.

[5/] Plaintiffs are, therefore, clearly wrong when they state in their response brief that civil rights "defendants are only awarded fees and litigation costs where it can be demonstrated that the plaintiffs' claim is brought in 'bad faith, vexatiously, wantonly, or for oppressive reason[s].'" Doc. No. 151, pp. 1-2.

2. When Does a Civil Rights Defendant Prevail?

a. *Marquart and Hughes*

The United States Supreme Court has specifically addressed the circumstances under which a civil rights plaintiff is said to "prevail" for purposes of civil rights fee-shifting statutes like §§ 1988(b) and 2000e-5(k). See Farrar v. Hobby, 506 U.S. 103 (1992). The Supreme Court has, however, not addressed the circumstances under which a civil rights defendant will be found to be a prevailing party. The undersigned has only found one circuit court which has squarely addressed the prevailing defendant issue in light of Christianburg and Farrar. See Marquart v. Lodge 837 of the Int'l Ass'n of Machinists and Aerospace Workers, 26 F.3d 842 (8th Cir. 1994). The Eighth Circuit's holding in Marquart has been followed by a district court in the Tenth Circuit. See Hughes v. Unified School District #330, Wabaunsee County, Kansas, 872 F. Supp. 882 (D. Kan. 1994). The undersigned will, therefore, look to Marquart and Hughes for guidance in determining whether Plaintiffs' voluntary dismissal of their claims with prejudice qualifies Defendant as a prevailing party under either § 1988(b) or § 2000e-5(k).

In Farrar the Supreme Court held that to be a prevailing party under § 1988(b), a plaintiff would have to obtain actual relief on the merits which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar, 506 U.S. at 111-112 (a holding with which the concurrence and dissent agree). If this test were used to determine prevailing status for civil rights defendants, as well as civil rights plaintiffs, Defendant

would technically be a prevailing party because Plaintiffs' voluntary dismissal of their complaint with prejudice materially altered the legal relationship between Plaintiffs and Defendant to the benefit of Defendant - Plaintiffs are now forever barred from asserting these same claims against Defendant. However, for the reasons outlined by the Eighth Circuit in Marquart, the undersigned finds that the Supreme Court would not apply the test annunciated in Farrar to determine prevailing status for civil rights defendants.

The plaintiff in Marquart worked for the McDonnell Douglas Corporation and she was a member of the International Association of Machinists & Aerospace Workers ("the union"). Plaintiff brought a Title VII action against her union, alleging that the union retaliated, or conspired with her employer to retaliate, against her because she had made sexual harassment complaints against other union members. Four days before trial of her Title VII claim, plaintiff moved to voluntarily dismiss her complaint with prejudice. The district court granted plaintiff's request, dismissed her complaint, and without analysis awarded the union its attorney fees as the prevailing party under § 2000e-5(k) after finding, pursuant to Christianburg, that plaintiff's claim was without foundation. Plaintiff appealed the fee award and the Eighth Circuit reversed, holding that the union was not a prevailing party under § 2000e-5(k) .

The issue first addressed by the Eighth Circuit on appeal was whether Farrar's "material alteration" test should be considered as a general prevailing party definition for civil rights cases (i.e., whether it should be extended to defendants). The Eighth Circuit concluded that Farrar should be limited to defining prevailing civil rights

plaintiffs, and it should not be used as a general prevailing party definition. The Eighth Circuit based its conclusion on the following rationales: First, with Christianburg the Supreme Court has specifically held that civil rights plaintiffs and defendants are to be treated differently when it comes to fee-shifting statues. Second, for the reasons stated in Christianburg, a prevailing civil rights defendant is entitled to attorney fees only in very narrow circumstances. Third, the Supreme Court has on several occasions, while discussing prevailing plaintiff status, had the opportunity to adopt a general definition of prevailing party and it has chosen not to do so.[6/] Had the Supreme Court wished to adopt such a general definition it probably would have done so. Instead, the Supreme Court has interpreted § 1988(b) and § 2000e-5(k) as mandating separate standards for prevailing civil rights plaintiffs and prevailing civil rights defendants. "Thus, the Farrar definition of prevailing plaintiff cannot be transformed into a definition for prevailing party in general." Marquart, 26 F.3d at 851.

Having determined that Farrar's prevailing plaintiff test could not be applied wholesale to the union, the Eighth Circuit was required to fashion a test which was consistent with the Supreme Court's analysis in Christianburg and Farrar. Based on Christianburg's pronouncement that civil rights defendants should rarely recover fees, the Eighth Circuit held that at the very least a prevailing defendant must prove that a plaintiff's case is frivolous, unreasonable, or groundless. Based on Farrar's

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[6/] See, e.g., Farrar, Hewitt v. Helms, 482 U.S. 755 (1987); Rhodes v. Stewart, 488 U.S. 1 (1988); and Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782 (1989).

pronouncement that Congress intended to permit the award of counsel fees only when a party has prevailed on the merits, the Eighth Circuit went on to hold that proof that a plaintiff's case is frivolous, unreasonable or groundless must follow a judicial determination of the plaintiff's case on the merits. Thus, at the very least defendant would have to make a successful motion for summary judgment on the merits. Marquart, 26 F.3d at 852. In short, a defendant cannot be a prevailing party unless it has benefitted from a judicial determination going to the merits of the case.[7/] Because plaintiff voluntarily dismissed her own complaint, there was never a judicial declaration on the merits of her case. The union could not, therefore, be a prevailing party under § 2000e-5(k). Id. Consequently, the Eighth Circuit reversed the district court's award of fees to the union.

The District of Kansas followed Marquart in Hughes and held that a voluntary dismissal with prejudice by a civil rights plaintiff did not confer prevailing party status on the defendant under § 1988(b). In Hughes, the plaintiff was the former superintendent of the defendant school district. Defendant terminated plaintiff, and plaintiff filed suit alleging that defendant had violated his right to procedural due process. Discovery in the case began, and after certain depositions had been noticed, plaintiff filed a motion to voluntarily dismiss his action with prejudice, which the court granted. Defendant then filed a motion seeking fees as the prevailing party

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[7/] The Eighth Circuit recognized a limited exception to its judicial determination rule for those cases where it was clear that the plaintiff voluntarily dismissed her complaint to escape an unfavorable judicial determination on the merits (e.g., a dismissal which comes after oral argument on a motion for summary judgment at which the court has indicated that it would sustain the motion, but before an order granting summary judgment has been entered). Marquart, 26 F.3d at 852.

under § 1988(b). Following Marquart, the court denied defendant's motion for fees. Hughes, 872 F. Supp. at 882-84. The court explicitly determined that an order dismissing a case with prejudice is not a judicial determination on the merits if it simply grants a voluntary motion to dismiss. Such an order is not a judicial determination on the merits of the case sufficient to confer prevailing party status on the defendant. Id. at 886.

The court in Hughes considered other approaches and rejected them in favor of the Eighth Circuit's approach. The court held that permitting a defendant to recover fees by simply establishing, after a voluntary dismissal by plaintiff, that the plaintiff's case was frivolous, unreasonable, or without foundation would permit the defendant to bypass the prevailing party step. In other words, the courts in Hughes and Marquart required the defendant to show that at some point prior to the moment it sought fees, there had been a judicial determination on the merits in the defendant's favor. Absent such a judicial determination, a defendant cannot establish that it has prevailed on the merits of the case. Hughes, 872 F. Supp. at 887. Once a defendant can point to such a judicial determination on the merits, it has earned prevailing party status and it may then recover fees upon a showing, if not inherent in the judicial determination on the merits, that the plaintiff's claim was frivolous,

unreasonable or without foundation.[8/] As the court in Hughes held, the Eighth Circuit's rule

> assures separate, meaningful treatment of the prevailing party and the merit steps. It furthers the same policy reasons given by the Supreme Court for distinguishing between plaintiffs and defendants under § 1988. It limits the need for mini-trials, if not full-blown trials, on the merits of the lawsuit whenever a plaintiff chooses to dismiss the case. It gives defendants the incentive to act promptly in seeking dispositive relief when the legal issues are controlling or when there are no genuine issues of material fact. It still encourages plaintiffs to dismiss promptly those cases plagued with proof problems. Finally, it keeps defendants from retaliating against plaintiffs or deterring other plaintiffs with the prospect of costly, protracted [post-dismissal] fee litigation.

Hughes, 872 F. Supp. at 887. The undersigned finds the holdings in Marquart and Hughes persuasive and recommends that they be applied to this case in the absence of any Tenth Circuit precedent directly on point.

b. ***Farrar***

As discussed in the previous section, the undersigned is convinced, for the reasons stated in Marquart and Hughes that the Supreme Court would not apply Farrar to determine prevailing party status for civil rights defendants. Nevertheless,

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[8/] See, e.g., EEOC v. Hendrix College, 53 F.3d 209, 211 (8th Cir. 1995); and Chacon v. Ezekiel, 957 F. Supp. 1265, 1267 (S.D. Fla. 1997) (holding that civil rights defendant could not be a prevailing where there had been no judicial adjudication on the merits because plaintiff voluntarily dismissed her claims pursuant to Fed. R. Civ. P. 41). None of the cases cited by Defendant are to the contrary. In each case Defendant cites, the case was either tried to judgment in favor of the defendant or a directed verdict was entered in favor of the defendant. See EEOC v. St. Louis-San Francisco Rwy. Co., 743 F.2d 739 (10th Cir. 1984); Marshall v. Nelson Electric, 766 F. Supp. 1018 (N.D. Okla. 1991); and Tang v. State of Rhode Island, 163 F.3d 7 (1st Cir. 1998). There was, therefore, no need for these case to address whether a judicial determination on the merits is necessary to confer prevailing party status on a defendant under either § 1988(b) or § 2000e-5(k).

even if Farrar were applied to this case, the undersigned finds that Farrar would counsel against awarding any attorney fees to Defendant in this case.

The plaintiff in Farrar filed a § 1983 action alleging various constitutional violations by the defendant, and seeking $17 million in compensatory damages. The case was tried to a jury. Plaintiff lost on all claims, but one, and on the one he was awarded only nominal damages in the amount of $1 after an appeal. Plaintiff then moved to recover his attorney fees under § 1988(b) as the prevailing party. The trial court granted plaintiff's motion and awarded fees. The court of appeals reversed the fee award, and the Supreme Court affirmed the circuit's denial of fees to the plaintiff.

The Supreme Court held that the plaintiff was "technically" a prevailing party because he had altered the legal relationship between himself and defendant by recovering nominal damages from defendant. The Supreme Court held, however, that under the circumstances a "reasonable" fee for this prevailing plaintiff was zero. The Court held that "[a]lthough the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988." Farrar, 506 U.S. at 114. "In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff [like the one Farrar] who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party." Id. at 115.

The undersigned finds that Defendant is in a substantially similar position to that of the plaintiff in Farrar. There is no real difference between a plaintiff who

"prevails" by winning nominal damages and a defendant who "prevails" because the plaintiff voluntarily dismissed his lawsuit. In both situations, the party may be said to have technically prevailed. However, in both types of cases, the reasonable fee for such a technically prevailing party should be zero as it was in Farrar. Thus, if Farrar were applied to this case, the undersigned would apply it fully and recommend that a reasonable fee for Defendant would be zero.

3. Applying The Marquart/Hughes Standard to Plaintiffs' Claims

Defendant did obtain a judicial determination on the merits regarding Plaintiff's original Complaint, which sought only injunctive relief. The Court considered the merits and denied injunctive relief. See Doc. No. 7. Defendant has made no showing, however, that Plaintiffs' original Complaint for injunctive relief was frivolous, unreasonable or without foundation as required by Christianburg. In fact, Defendant's motion is directed solely at the claims for compensatory damages pled by Plaintiffs in their First Amended Complaint. The undersigned finds, therefore, that no attorney fees should be awarded to Defendant in connection with the injunction claim in Plaintiffs' original complaint.

With regard to the Title VII and First Amendment claims in Plaintiffs' First Amended Complaint, Defendant never obtained a judicial determination on the merits of these claims as required by Marquart and Hughes. Defendant does not, therefore, qualify as a prevailing party under either § 1988(b) or § 2000e-5(k).

There are often numerous tactical reasons why a plaintiff would choose to voluntarily dismiss his claim. Plaintiffs in this case had an appeal pending in the Tenth Circuit, upon which they were apparently willing to rely for vindication of their rights. Plaintiffs in this case were also plagued by their inability to find adequate representation. Their lead counsel had been personally sanctioned by the Court on several occasions and he was embroiled in personal commitments which prevented him from adequately prosecuting this case on Plaintiffs' behalf. Based on a review of the entire record, the undersigned finds, therefore, that Plaintiffs did not voluntarily dismiss their claims in order to avoid an unfavorable judicial determination on the merits which was looming on the horizon. The exception outlined in Marquart is, therefore, not applicable in this case.

RECOMMENDATION

The undersigned hereby recommends that Defendant's motion for attorney fees as the prevailing party be **DENIED**. [Doc. No. 147]. Having failed to obtain a judicial determination on the merits, Defendant does not qualify as a prevailing party under either 42 U.S.C. § 1988(b) or § 2000e-5(k).

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 24 day of July 2000.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 25 Day of July 2000, via

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE L. FORD,
SSN: 448-40-7705,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 97-CV-0621-EA

ENTERED ON DOCKET
DATE JUL 25 2000

ORDER

This case is hereby reversed and remanded in accordance with the Tenth Circuit Court of Appeals' Order and Judgment filed in this Court on July 21, 2000.

SO ORDERED this 24th day of July, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LINDA J. WALKER,
SSN: 447-46-8960,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 99-CV-404-K (M)

REPORT AND RECOMMENDATION

Plaintiff, Linda J. Walker, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26

[1] Plaintiff's July 14, 1993 application for disability insurance benefits was denied initially, upon reconsideration and by an Administrative Law Judge (ALJ) without a hearing, on August 17, 1994. No further action was taken by Plaintiff on that claim. Plaintiff filed a new application for disability insurance benefits on January 9, 1997, which was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held August 15, 1997. By decision dated September 25, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council denied review of the findings of the ALJ on March 23, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born June 3, 1948, and was 49 years old at the time of the hearing. [R. 40, 79, 91]. She claims to have been unable to work since January 10, 1992,[2] due to headaches, chest pain, degenerative disc disease and herniated disc with associated pain in the back, neck, legs, shoulders, lower arms and hands. [R. 37-39, 125, 121, 132, 137, 146].

In the decision under review, the ALJ determined that Plaintiff has a severe impairment consisting of degenerative disc disease but that she retains the residual functional capacity (RFC) to perform a wide range of light work activities with

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[2] The onset date was amended to August 18, 1994. [R. 35-36]. The time period under consideration is between that date and June 30, 1996, the date Plaintiff was last insured for disability insurance benefits under Title II of the Social Security Act. Disability must have been established by the evidence prior to the date insurance benefits expired. *Miller v. Chater*, 99 F.3d 972, 975 (10th Cir. 1996); *Henrie v. United States Dep't of Health & Human Servs.* 13 F.3d 359, 360 (10th Cir. 1993).

restrictions on stooping, crouching, bending, climbing, kneeling, crawling, and pushing and pulling of arm and leg controls.[3] He determined that Plaintiff's impairments do not prevent her from performing her past relevant work (PRW) as a service order clerk and that she is, therefore, not disabled as defined by the Social Security Act. [R. 22]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's finding that she retained the capacity to perform the prolonged standing required of light work or the prolonged sitting required of her past work on a regular and continuing basis is not supported by substantial evidence. Specifically, Plaintiff asserts the RFC determination reached by the ALJ was not based upon the evidence as a whole; that in assessing Plaintiff's RFC, the ALJ improperly ignored the treating source evidence contained in the record. For the reasons expressed below, the undersigned Magistrate Judge recommends that the District Court remand the case to the Commissioner for further development and reconsideration.

The majority of the medical evidence contained in the record relates to Plaintiff's 1989 on-the-job injury and subsequent treatment. [R. 155-219]. There is no dispute that Plaintiff's injury on August 18, 1989, resulted in a herniated disc, which was

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[3] "Light work" involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. S 404.1567 (1989).

confirmed by MRI. [R. 172]. Lawrence Reed, M.D., David R. Hicks, M.D., and Griffith Miller, M.D., were Plaintiff's treating physicians through 1993. [R. 155-196]. The record also contains consultative and evaluative examination reports by Drs. Casey Truett, Paul J. Krautter and Ronald Passmore for that time period. [R. 197-219].

In his decision denying benefits, the ALJ noted the outpatient records from St. Francis Hospital which he referred to as "Exhibit B-20." [R. 17]. He mentioned the findings upon a discogram performed at St. Francis Hospital on August 31, 1995, identified as "Exhibit B-22" and referred to "progress notes" by Randall L. Hendricks, M.D., dated September 13, 1995, identified as "Exhibit B-23." *Id.*

Although not mentioned by the ALJ, also included within the "Exhibit B" portion of the administrative record are treatment notes by Dr. Hicks, one of Plaintiff's long term treating physicians. [R. 333-336]. Those records indicate that Dr. Hicks determined Plaintiff had "not yet reached the capacity to return to work in the job in which she was active at the time of her last evaluation" on December 6, 1989. One month later, on January 19, 1990, Dr. Hicks wrote that Plaintiff's treatment program had "plateaued." He set forth lifting restrictions, described her range of motion test results and assigned an 8% permanent partial impairment rating. [R. 336]. The report was obviously written for Workers' Compensation Benefits purposes and did not contain an expressed opinion regarding Plaintiff's ability or inability to return to work at her former job. *Id.* The remaining treatment notes are, for the most part, dated prior to the time period under consideration. However, there are notes from August and September 1994, which is during the relevant time period, indicating Dr. Hicks had re-

examined Plaintiff. [R. 333]. He noted Plaintiff complained of pain similar to that for which he had previously treated her and determined she needed continuing therapy by Dr. Reed. *Id.* Dr. Reed's updated medical records for that time period are not found in the administrative record.

"It is beyond dispute that the burden to prove disability in a social security case is on the claimant." *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir.1997). Nevertheless, a social security disability hearing is nonadversarial, and the ALJ bears responsibility for ensuring that "an adequate record is developed during the disability hearing consistent with the issues raised." *Henrie v. United States Dep't of Health & Human Servs.*, 13 F.3d 359, 360-61 (10th Cir.1993). The Court notes the previously assigned ALJ in this claim sent Plaintiff's attorney a request for updated medical records on June 26, 1997. [R. 357]. However, the Court also notes that "[a]n ALJ has the duty to develop the record by obtaining pertinent, available medical records which come to his attention during the course of the hearing." *Carter v. Chater*, 73 F.3d 1019, 1022 (10th Cir.1996); see also *Baker v. Bowen*, 886 F.2d 289, 292 (10th Cir.1989); 20 C.F.R. §§ 404.944, 416.1444. The ALJ has the power to subpoena such records if necessary. See *Baker*, 886 F.2d at 292; 20 C.F.R. §§ 404.950(d)(1), 416.1450(d)(1). The record reveals no attempt made by the ALJ whose decision is now under review to obtain updated medical records from Dr. Reed.

There is evidence in the record that Plaintiff was being treated during the relevant time period by Dr. Reed. [R. 314, 333]. In light of Dr. Reed's letter of November 5, 1997, stating Plaintiff is under his treatment and that she had not been

able to work since 1991 [R. 367], it is reasonable to conclude these records could have a material impact on the disability determination. See *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994). The records are especially relevant in light of the ALJ's comment while making his credibility determination that "[i]f the claimant were in the constant and disabling painful condition as alleged, it is reasonable to assume she would exhaust every means possible to obtain relief of that pain." [R. 19]. The ALJ referred to Plaintiff's testimony that she had not sought additional medical treatment after the resolution of the Workers' Compensation Claim which was reopened in 1995 for change of condition for the worse. [R. 19, 52-53]. However, the evidence that Plaintiff was treated by Dr. Hicks and Dr. Reed contradicts the ALJ's statement that Plaintiff did not seek or receive medical treatment during the relevant time period (August 18, 1994 to June 30, 1996). [R. 313, 332-334, 344, 352, 362, 367].

Furthermore, because the medical evidence documenting the history of Plaintiff's back pain and corresponding treatment is substantially relevant to the impairments and pain that Plaintiff is now alleging, the ALJ's failure to explain what medical evidence he considered or of the weight he accorded the medical evidence he did consider is error. See *Gardner v. Brian*, 369 F.2d 443, 447 (10th Cir. 1966) (citing *Kerner v. Celebrezze*, 340 F.2d 736 (2nd Cir. 1965)). Although an ALJ is not required to discuss every piece of evidence, the record must demonstrate that the ALJ considered all of the evidence. *Clifton v. Chater*, 79 F.3d 1007, 1009-10. The conclusory statement by the ALJ that he considered all the medical evidence of record, including medical evidence, clinical and laboratory tests, statements and testimony,

including evidence not specifically cited, is not sufficient to show the ALJ complied with his duty to demonstrate that he evaluated all of the evidence. See *Herbert v. Heckler*, 783 F.2d 128, 130 (8th Cir. 1986). This is especially true in this case, because, in determining that claimant was not disabled and was capable of returning to her past relevant work, the ALJ stated that "the claimant's treating physicians did not place any functional restrictions on her activities that would preclude light work activity with the previously mentioned restrictions prior to June 30, 1996." In reaching this conclusion, he apparently relied upon a statement attributed to Dr. Hendricks that, "although the claimant's menu of complaints was quite long, her objective findings were few and far between." (Exhibit B-23). [R. 20]. However, there is medical evidence in the record that the ALJ did not address: that Dr. Reed had assessed Plaintiff's ability to work was restricted to light work with **no** lifting and reaching in November 1990 [R. 157, 164]; that it was Dr. Miller's opinion that Plaintiff's condition had worsened in April 1995 [R. 313]; that Plaintiff had returned to Drs. Hicks and Reed for additional care during the relevant time period [R. 333, 334, 367]; and that there were conflicting opinions between independent medical examiners for the Workers' Compensation Court regarding the extent of Plaintiff's degenerative disc disease and spinal root involvement and whether surgical intervention was warranted [R. 314-315, 355]. In light of this evidence the ALJ's conclusory statement is insufficient under the established precedent. See *Goatcher v. United States Department of Health & Human Services,* 52 F.3d 288, 290 (10th Cir. 1995). The ALJ is required to "evaluate every medical opinion" he receives, 20 C.F.R. §

404.1527(d), and to "consider all relevant medical evidence of record in reaching a conclusion as to disability." *Baker v. Bowen*, 886 F.2d 289, 291 (10th Cir.1989). "[I]n addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." *Clifton v. Chater*, 79 F.3d 1007 (10th Cir.1996) (citations omitted).

The Court further notes the ALJ failed to make specific and detailed predicate findings concerning the demands of Plaintiff's past job and how these demands mesh with Plaintiff's particular exertional and nonexertional limitations, as required by the regulations and rulings at step four. See SSR 96-8p, 1996 WL 374184; SSR 82-62, 1982 WL 31386, at *4; and *Winfrey*, 92 F.3d at 1023-25. Additionally, the ALJ's alternative step five finding cannot stand as written because the medical record is incomplete resulting in the lack of sufficient basis for the Court to conclude the RFC as set forth by the ALJ is supported by substantial evidence.

Based upon the above, the undersigned United States Magistrate Judge RECOMMENDS this claim be remanded to the Commissioner to further develop the record, reconsider all the evidence, accord the medical evidence and the opinions of Plaintiff's doctors their appropriate weight and to make specific and well-articulated findings in accordance with the pertinent criteria identified by the regulations and the courts.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten

(10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

SUBMITTED this 24th day of July, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or their attorneys of record on the 25 day of July, 2000.

58060019:lp

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALDEN'S MACHINE, INC.

Plaintiff,

v.

CLEAN AIR CONSULTANTS and FILTER ONE, INC.,

Defendants.

CIVIL ACTION NO. 99-CV-0519-H (E)

STIPULATION OF DISMISSAL

Come Now the Plaintiff, Walden's Machine, Inc., and the Defendants, Clean Air Consultants and Filter One, Inc., and they make this Stipulation of Dismissal for the reason that the instant case has been settled.

BROWN, HERMAN, DEAN, WISEMAN, LISER & HART, L.L.P.

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ATTORNEYS FOR DEFENDANTS,
CLEAN AIR CONSULTANTS and
FILTER ONE, INC.

58060019.stp

FILED

JUL 24 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 00CV0160H(E)**
	)	
LORRI K. CROSS,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE JUL 24 2000

STIPULATION OF DISMISSAL

The Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and Defendant, Lorri K. Cross, pro se, hereby stipulate to the dismissal of this action pursuant to Rule 41 (a)(1)(ii), Federal Rules of Civil Procedure.

Dated this 20 day of July, 2000.

UNITED STATES OF AMERICA
Stephen C. Lewis
United States Attorney

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SUBMITTED BY:

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LORRI K. CROSS, Defendant
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Tulsa, OK 74105

FILED

JUL 24 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HILTI, INC.,

Plaintiff,

v.

RONALD S. KORMAN, a/k/a Steve Wilson, BRUCE M. BERGER, a/k/a Joe Hendersen, KEVIN KELLEHER, JERRY GULLO, CONCORD INDUSTRIES, INC., a Florida Corporation, and VERDE INDUSTRIES, INC., a Florida Corporation,

Defendants.

Case No. 99-CV-0744 B (J)

ENTERED ON DOCKET
DATE JUL 24 2000

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law made by the Court in connection with the hearing on default judgment held on July 13, 2000, Judgment is hereby entered in favor of Hilti, Inc. against Defendant Gullo in the amount of $1,340,399.45 and against Defendants Berger and Korman in the amount of $1,289,576.90. The liability will be joint and several with the exception of the $50,822.55 in additional damages assessed solely against Gullo, which shall be his sole liability.

Plaintiff Hilti has agreed to forego an award of costs and attorneys fees.

Thomas R. Brett
District Judge
United States District Court For The
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HILTI, INC.,

Plaintiff,

v.

RONALD S. KORMAN, a/k/a Steve Wilson, BRUCE M. BERGER, a/k/a Joe Hendersen, KEVIN KELLEHER, JERRY GULLO, CONCORD INDUSTRIES, INC., a Florida Corporation, and VERDE INDUSTRIES, INC., a Florida Corporation,

Defendants.

Case No. 99-CV-0744 B (J)

Findings of Fact and Conclusions of Law

This matter came on for hearing upon Plaintiff's Motion for a Default Judgment against Defendants Jerry Gullo, Bruce Berger and Ronald Korman. Gullo has not entered an appearance in the case. Mr. Berger and Mr. Korman entered an appearance pro se and filed a motion and brief in which they asserted: (1) That default was not appropriate because they were not properly served, and; (2) That the case should be transferred to Florida because the Northern District of Oklahoma is not a convenient forum for this litigation.

Findings of Fact

1. Mr. Berger admitted at the hearing that Dana Berger, who is over eighteen years of age and who also is his wife, accepted the mailed Summons and Complaint at his residence. Mr. Berger admitted that the summons and complaint were received at his home by means of certified mail, return, receipt requested on or about September 28, 1999.

2. Mr. Korman admitted at the hearing that the summons and complaint were received at his residence by means of certified mail, return receipt requested on or about September 28, 1999. Mr. Korman admitted that he had actual notice of the complaint and summons, but he denied that he had signed the return receipt attached to Plaintiff's motion.

3. The acts of fraud detailed in the Complaint were facilitated through a conspiracy with Hilti's former employee, Jerry Gullo, in this judicial district. The checks in payment of the conspiracy were made by Hilti in Tulsa, Oklahoma and the impact on the victim was in Tulsa. A large number of the acts in furtherance of the conspiracy occurred in the Northern District of Oklahoma. Gullo, Berger, and Korman were indicted in the Northern District and entered pleas of guilty in the United States District Court for the Northern District. Documents relating to the fraud perpetrated on Hilti and a number of witnesses are located in the Northern District of Oklahoma.

4. Gullo, Korman, and Berger plead guilty to violations of 18 U.S.C. §371 (Conspiracy) and 18 U.S.C. §1341 (Mail Fraud).

5. Gullo plead guilty to defrauding Hilti of $446,833.15 through a number of transactions over a two-year period. As part of his sentence, Gullo was ordered to make restitution of $446,833.15.

6. Korman and Berger plead guilty to defrauding Hilti of $429,858.99 through a number of transactions over a two-year period. As part of their sentences, Berger and Korman were ordered to make restitution in the amount of $429,858.99. At hearing, Korman and Berger admitted their previous guilty pleas and admitted the facts in their plea

agreements relating to the amounts to which they plead guilty of defrauding Hilti by means of an interstate conspiracy.

Conclusions of Law

1. Gullo, Berger, and Korman properly were served with the Complaint and Summons on or about September 28, 1999. No Answer or other defensive pleading was filed. Berger was served pursuant to 12 Okla. Stat. §2004(C)(2). Korman admitted that he received the summons and complaint by means of certified mail, return receipt requested on September 28, 1999. Korman thus admitted having actual notice of the proceedings and had a full opportunity to defend. Pursuant to 12 Okla. Stat. §2004(C)(5) & (6) actual notice or acknowledgement of service may be held sufficient service of process.
2. A Plaintiff has latitude in choosing the venue of an action. Venue is proper in the Northern District of Oklahoma and there has been no showing that the interest of justice requires a transfer to another judicial district.
3. The allegations of the Complaint, the testimony at the hearing by Korman and Berger and their pleas of guilty to the acts alleged in the indictment are sufficient to make out a claim under RICO, 18 U.S.C.§1964(c). These defendants, acting through a conspiracy, committed a pattern of criminal acts against Hilti by means of interstate wire and telephone communications.
4. Defendants plead guilty to sums certain in their plea agreements and again made admissions in their testimony at the hearing. These actual damage amounts will be trebled pursuant to 18 U.S.C.§1964(c) et seq.

5. The Court concludes that judgment should be entered in favor of Hilti, Inc. against Defendant Gullo in the amount of $1,340,399.45 and against Defendants Berger and Korman in the amount of $1,289,576.90. The liability will be joint and several with the exception of the $50,822.55 in additional damages assessed solely against Gullo, which shall be his sole liability.

6. Plaintiff Hilti has agreed to forego an award of costs and attorneys fees.

6. Judgment shall be entered in accordance with the foregoing.

Thomas R. Brett
District Judge
United States District Court For The
Northern District of Oklahoma

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOHN COLLINS, et al.)
)
Plaintiffs,)
)
v.) CASE NO. 4:00-CV-000124-BTC
)
DEPUY INC., et al.,)
)
Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE AS TO PLAINTIFF COLLINS

Plaintiff John Collins, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff John Collins and all defendants have been compromised and settled.

2. The claims of plaintiff John Collins are dismissed with prejudice as to all defendants.

3. The claims of other plaintiffs are not affected by this stipulation.

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4. No costs are awarded.

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John Collins

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Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JADCO MANAGEMENT CO.,

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,

Defendant.

Case No. 99-CV-1034-H(E)

JUDGMENT

This matter came before the Court on Defendant's motion for summary judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on July 13, 2000.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 24TH day of July, 2000.

Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAY WHITE,

Plaintiff,

v.

ASEC MANUFACTURING CO.,

Defendant.

98-CV-823-H(J)

JUDGMENT

This matter came before the Court on Defendant's Renewed Motion for Summary Judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on July 14, 2000.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 24TH day of July, 2000.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ONEOK GAS STORAGE, L.L.C., an Oklahoma limited liability company,

Plaintiff,

vs.

OSAGE TRIBE OF INDIANS IN OKLAHOMA,

Defendant.

Case No. 00-CV-0041E (J)

ORDER GRANTING MOTION TO DISMISS

NOW on this 20th day of June, 2000, this case comes before the Court on Defendant's Motion to Dismiss for: (a) this Court's lack of subject matter jurisdiction; (b) the failure of Plaintiff to name as a defendant the real party in interest, the United States as Trustee for the Osage Nation; and (c) Plaintiff's failure to state a claim upon which relief can be granted.

Plaintiff appeared by counsel Rob F. Robertson and Dax D. Junker of Gable & Gotwals, and Defendant appeared specifically, for purposes of presenting the subject Motion, by counsel Bradley D. Brickell of Mahaffey & Gore, P.C.. The Court, having heard and considered the arguments of counsel and being fully advised through the briefs of the parties and other authorities presented, finds that Defendant's Motion to Dismiss should be and the same is hereby granted.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is hereby granted and the instant proceeding is dismissed.

Dated this 18th day of July, 2000.

James O. Ellison, Senior Judge

APPROVED AS TO FORM:

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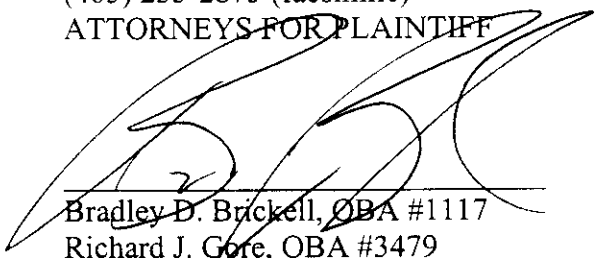

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IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 20 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEBRA J. HILL,

Plaintiff

v.

KENNETH APFEL, Commissioner of Social Security Administration,

Defendant.

Case NO. 99-CV-968-B(E)

ENTERED ON DOCKET

DATE JUL 21 2000

ORDER

Before the Court is the parties' Agreed Motion To Reverse and Remand to the Commissioner for further administrative proceedings before an Administrative Law Judge. Upon examination of the merits of this case, it is hereby ORDERED that this Motion be granted and this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

THUS DONE AND SIGNED on this 20 day of July, 2000.

Claire V. Eagan
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA ESLEY, ADMINISTRATRIX OF THE ESTATE OF RICHARD ESLEY,

PLAINTIFF,

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT.

CASE NO. 99-CV-646-B

JUDGMENT

This action came on for jury trial before the Court, the Honorable Thomas R. Brett presiding, and the issues having been duly tried and the jury having rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiff, Linda Esley, Administratrix of the estate of Richard Esley, take nothing from the Defendant, State Farm Mutual Automobile Insurance Company, and that the action be dismissed on the merits. Costs are assessed against the Plaintiff upon timely application pursuant to N. D. LR 54.1. The parties are to pay their respective attorney's fees.

Dated at Tulsa, Oklahoma this 20th day of July, 2000.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAROLD NIMMO,

Plaintiff,

v.

BILL RICHARDSON,
Secretary of the United States
Department of Energy,

Defendant.

Case No. 99-CV-0432-J

ENTERED ON DOCKET

DATE JUL 21 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Harold Nimmo, by his attorney of record, Bradford D. Barron, and the Defendant, Bill Richardson, Secretary of the United States Department of Energy, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, having fully settled all claims asserted by the Plaintiff in this litigation, hereby stipulate to, and request entry by the Court, of the Order submitted herewith dismissing all such claims with prejudice.

Dated this 21st day of July, 2000.

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